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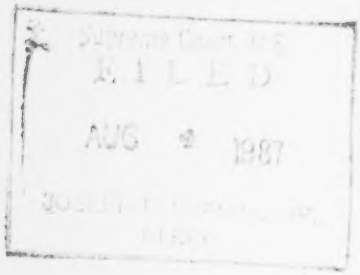

No. 87

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM 1987

SHERMAN COLLEGE OF STRAIGHT CHIROPRACTIC, AND STRAIGHT CHIROPRACTIC ACADEMIC STANDARDS ASSOCIATION, INC.,

Petitioners,

v.

AMERICAN CHIROPRACTIC ASSOCIATION INC., THE COUNCIL ON CHIROPRACTIC EDUCATION, INC., NATIONAL BOARD OF CHIROPRACTIC EXAMINERS, AND SID E. WILLIAMS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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Questions Presented

The lower court held in this Sherman Act conspiracy case that defendants' explicit combination to eliminate the petitioners from the profession of chiropractic education and limit consumer choice regarding available services was not "unreasonable" because, although petitioners would be eliminated from the market, the conspirators, constituting a majority of the profession, would continue to compete among themselves. The Court thus squarely held that Klor's Inc., v. Broadway Hale Stores, Inc., 359 U.S. 207, 79 S.Ct. 705 (1959) is "no longer good law" (R18-904). The court also held that respondents' private, exclusionary standard-setting conduct was wholly immune under the First Amendment from Sherman Act challenges. The

questions presented are:

1) Whether a horizontal agreement among dominant competitors to exclude other competitors from a market through predatory conduct, creating a concerted refusal to deal, is "reasonable" because some of the conspirators continue to compete among themselves and thus have not caused "actual anticompetitive effect in the relevant market"?

2) Whether a private conspiracy among professionals to eliminate competition with respect to services provided to consumers, precluding customer choice with respect to alternative services, is presumptively unreasonable under Federal Trade Commission v. Indiana Federation of Dentists, ___U.S.___, 106 S.Ct. 2009 (1986)?

3) Whether a conspiracy among professionals to exclude other competition through both lobbying and private standard-setting and other non-lobbying actions is wholly protected by the Noerr-Pennington doctrine and state action doctrine merely because state boards or legislatures subsequently refer to the conspirators' private standard setting organization in rules or statutes?

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CHIROPRACTIC et al.,

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v.

AMERICAN CHIROPRACTIC
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Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

Petitioners, Sherman College of Straight Chiropractic (Sherman), and the Straight Chiropractic Academic Standards Association, Inc., (SCASA), respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered on March 27, 1987.

OPINIONS BELOW

The opinion of the court of appeals (App. A, infra) is reported at 813 F.2d 349. The opinion of the district court (App. B, infra) is reported at 654 F.Supp. 716. A supplemental opinion of the district court is also attached. (App. C infra). The judgment of the district court was entered January 9, 1986 (App. D infra).

JURISDICTION

The judgment of the court of appeals (App. E, infra) was entered March 27, 1987. Timely petitions for rehearing and for en banc consideration were denied by orders dated May 8, 1987, and May 18, 1987. (App. F & G, infra). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1 (1976), provides in relevant part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

Section 2 of the Sherman Act, 15 U.S.C. §2 (1976), provides in relevant part:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of .....

STATEMENT OF THE CASE

1. Chiropractic, a professional health care service, was developed in 1895 by D.D. Palmer, who formulated the theory that the purpose of chiropractic was to correct subluxations (misaligned vertebrae that interfere with nerve

function). (R14-26-27). Palmer found that misaligned vertebrae can disturb nerve function, that this disturbance interferes with the body's striving to maintain its own health, and when misaligned vertebrae are realigned in order to relieve interference with nerve function, the body's ability to maintain its own health is enhanced (R14-30).

This concept of adjusting subluxations to relieve nerve interference is the traditional basis of the legal definition adhered to by most state laws on scope of practice of chiropractic -- so-called "straight" chiropractic -- and distinguishes chiropractic from the practice of medicine. The practice of medicine is traditionally defined as the diagnosis and treatment of disease. Practitioners

of chiropractic are traditionally not medical doctors and are not licensed by the respective states to practice medicine.

An alternative to straight chiropractic -- so-called "mixer" chiropractic -- has been developed and has grown within the chiropractic profession. The "mixers" generally purport to engage in medical diagnosis. Within the past fifteen years the "mixers" have achieved dominance within the profession after a period of coexistence. This litigation arose in response to the concerted efforts of the "mixers" to end coexistence and eliminate the traditional alternative offered by straight chiropractic.

At Petitioner, Sherman College, the chiropractic student is taught to inform

the patient that a chiropractor does not treat specific bodily ailments such as headaches, ulcers, diabetes, etc. The chiropractor informs the patient that the chiropractor deals only with the safe correction of subluxations; he engages in diagnosis only with respect to subluxation and the safety of giving an adjustment. The Sherman chiropractor, however, is trained in first aid and informs the patient of unusual findings that are outside the scope of chiropractic. The district court recognized that, "Sherman is clearly a substantial educational institution, dedicated to giving its students a quality chiropractic education," and that "Sherman's founder and president...[is] a person of high intelligence and integrity" (App. B, pg. 58a).

Utilizing the traditional "straight" chiropractic approach, Sherman teaches that chiropractic diagnosis and care are not an alternative to medical diagnosis and care of bodily diseases and ailments (R14-36). It is critical to public safety and consistent with state laws defining the practice of medicine that no patient be mislead or confused into thinking that the chiropractic adjustment is a specific treatment for any ailment or is a substitute for the medical doctor's diagnosing or treating a specific bodily problem.

2. By contrast, the accreditation standards of respondent Council on Chiropractic Education (CCE), a private standard-setting organization now controlled by the majority of chiropractic colleges and the

respondents, require that chiropractic colleges adhere to a "medical (mixer) objective" - purporting to teach chiropractic students to diagnose and care for all diseases and ailments to which the human body may be subject. The CCE excludes from membership and accreditation colleges like petitioner Sherman that do not adhere to such a medical objective. (R14-47; D. Ex. 29; P. Ex. 459).

CCE accreditation is critical to a chiropractic college's ability to compete with other chiropractic colleges, since the graduates cannot be licensed in thirty-nine states unless they graduate from a college accredited by the CCE.[1]

Fn. 1 is contained at the end of this petition because of its length.

3. Sherman's refusal to change to a medical objective sought by the majority of chiropractic colleges in violation of state laws defining the practice of medicine was the primary reason CCE refused to accredit Sherman in 1974 (R11-208-3; R14-112,113). In a letter to Sherman College in 1978. CCE reaffirmed its insistence that Sherman adopt a medical objective. (P. Ex. 53). Sherman chose not to, in effect, teach its students to engage in the unauthorized practice of medicine.

The CCE's insistence that colleges teach the practice of medicine to the exclusion of teaching chiropractic is embedded in the foreword to the CCE's Standards for Accreditation of Chiropractic Colleges, which is quoted in the trial court's January 9, 1986 order

(see App. B pg. 7a).

The former Executive Director of respondent National Board of Chiropractic Examiners (NBCE) admitted that the goal of the CCE and respondent American Chiropractic Association (ACA), a professional organization for chiropractors in the United States, was to have only one accrediting agency in the chiropractic profession in the United States, and to exclude any colleges that did not advocate the medical objectives embraced in the CCE standards (Holman Dep. pg. 90). The ACA also announced this goal in a written master plan. (P. Ex. 3)

A former officer of the CCE testified that it was his goal to "squelch" institutions like Sherman (P. Ex. 393; Webster dep. p. 203; R21-1200-1201), rather than permit their

continued coexistence.

The respondents communicated continuously and regularly among themselves concerning their efforts to limit the profession to the CCE medical concept and to exclude institutions like Sherman and its graduates. They jointly encouraged respondent NBCE to pass a resolution to allow only graduates of CCE schools to sit for the national examination. (P. Exs. 6, 40, 52, 161, 193, 330, 332, 344). They jointly urged the NBCE to have only faculty or administrators affiliated with CCE schools sit on the national test committees (Pl. Exs. 121, 354, 179, 222, 225, 231, 234, 235, 237, 238, 254; Holman dep. pgs. 57-62).

Respondents and others including representatives of other competing

chiropractic colleges, at a Task Force meeting sponsored by respondent ACA, affirmed their agreement that CCE should continue to exclude institutions like Sherman. The Task Force issued a report which stated in part:

> CCE should not weaken or dilute its present standards on diagnosis and should not admit to any CCE status, chiropractic colleges that do not meet such standards. (P. Ex. 132).

A former officer of the CCE and then president of the Federation of Chiropractic Licensing Boards (FCLB), a private organization of members of the chiropractic licensing boards of each state, asked those at the Task Force meeting to drive Sherman from the profession emphasizing that "this profession cannot allow such intrusion" (Webster dep. 192-193; P. Ex. 206).

After the Washington Task Force

meeting, the president of one CCE member college who attended wrote to the President of the ACA:

> I think that the conference on problems....with the straight element of chiropractic was most worthwhile and I look forward to other involvement in this task of defeating them....

(Pl. Ex. 203).

The President of the CCE wrote the NBCE declining to attend a meeting to discuss a resolution to exclude Sherman graduates from the NBCE examination. He said the CCE was sympathetic with the position but "we do not want to establish evidence of collusion regarding licensing matters." (Pl. Ex. 222).

The Chairman of the Commission on Accreditation of the CCE outlined to the FCLB and other affiliated groups ways by which Sherman was seeking to "circumvent" the CCE. He stated that the CCE had a

"proprietary interest" in its standards and that any circumvention of CCE standards must not be allowed. (Pl. Ex. 45, 112, 219, 174 and 304).

4. The CCE standards were created by the college members of the CCE. That action was financially, not educationally, motivated, and was not based on studies or data (P. Ex. 8). Chiropractors who are taught according to the CCE standards that they must diagnose and care for the body in health and disease, by definition, perform more patient services and therefore increase revenue.

As a result of the foregoing exclusionary conduct, petitioner Sherman cannot attract chiropractic students in sufficient number to remain in business.

Respondents presented to the United

States Department of Education (USDE) false testimony that the CCE accredited colleges like Sherman and did not impose upon the colleges a medical objective. (Tr. Trans. vol. 10. pg. 1321-22) The CCE presented the false testimony because the USDE would not recognize CCE if CCE excluded an important approach to chiropractic as that taught at Sherman.

In March, 1979, the USDE wanted evidence that CCE would accredit colleges like Sherman. Prior to that hearing, the CCE had adopted a resolution directing another college to show proof that it published in its bulletin that it taught the diagnosis and care of the human body in health and disease (medical objective). (P. Ex. 358) At the time of this resolution that college was applying for accreditation by CCE.

Despite requiring that college to publish this statement, the CCE had the president of that college testify to the USDE that the CCE allowed for straight colleges and did not force chiropractic colleges to adhere to a medical (mixer) objective. The purpose of the testimony was to mislead the USDE into thinking the CCE accredited schools like Sherman. (P. Ex. 449)

The chairman of the Commission on Accreditation of the CCE also falsely testified to USDE that the CCE allowed diverse philosophies with respect to the scope of practice. (P. Ex. 449).[2]

---

2. This same person on behalf of CCE had previously stated CCE had a "proprietary interest" in its standards and that Sherman should not be allowed to "circumvent" those standards. The testimony of the President of Life College and the testimony of the Chairman of the Commission on Accreditation were

Further, after returning from testifying before the USDE, the president of that college stated to an assembly of his faculty and student body the following about his testimony:

> Now I want you to realize that we are not 100% happy with the verbage of the CCE's approach to chiropractic, for it does and it's true that it does smack of being a medical doctor in that we diagnose to determine the disease and then turn around and specifically apply an adjustment to treat that disease...
>
> I thought [at the USDE hearing] we didn't come into the fact that we don't treat diseases because CCE seems to think we do treat diseases. (P. Ex. 447).

Fn. 2 continued: in direct conflict with the resolution passed by the CCE comanding Life College to publish proof of its adherence to the CCE concept, (P. Ex. 449): in conflict with the article published by the president of Life College in July/August 1979; and in conflict with CCE's communications with Sherman College.

5. Petitioners claimed in their complaint that respondents conspired to restrain trade within and monopolize the chiropractic education and chiropractic care markets by preventing the plaintiffs and others from pursuing "straight"[3] chiropractic and forcing the mixer medical objective in violation of state laws defining the practice of medicine. (R14-43,44).

---

3. The trial court used the term "anti-diagnostic" as synonymous with the term "straight." For purposes of this petition it is of no legal significance whether the petitioners are referred to as "straights" or "anti-diagnostics", and it is of no legal significance whether the respondents are referred to as "mixers" or "pro-diagnostics." The importance of the distinction between the two groups is that petitioners define chiropractic according to the traditional definition under state laws on the scope of the chiropractic. The respondents, by contrast, define chiropractic to bring the health care service within the state law definition of the practice of medicine.

Such exclusionary conduct precluded customers from choosing the traditional alternative of "straight" chiropractic services and amounted to the elimination of competition between "straights" and "mixers".

It is common for state licensing laws to require candidates for licensure to be graduates of colleges accredited by federally recognized specialized accrediting agencies. Accreditation organizations in America are private rather than govermental. Petitioners have contended that membership in them should be voluntary and the function of the accreditation organization is to evaluate the degree to which a college meets its own objectives. It should not be a function of accreditation to dictate what the objectives of a college should

be, provided the objective falls within the legal limits of the profession. (R17-743-63).

6. At the conclusion of the trial the Court stated orally that Klor's, Inc. v. Broadway Hale Stores, Inc. 359 U.S. 207, 79 S.Ct. 705 (1959) was no longer good law (R18-904). Based upon this view, in its final written order the court held that the defendants' conspiracy to boycott Sherman College from competing with the CCE accredited colleges had no anticompetitive effect. (App. B) Notwithstanding this conclusion, the trial court acknowledged that "the [defendants]...achieved dominance in the profession...through the sponsorship of the ACA,"...that "[i]n 1971 ACA formed ...CCE...and backed CCE financially," and that CCE refused to

accept Sherman College because of Sherman refused to subscribe to defendants' philosophy. (App. B pg. 6a - 7a). Also, despite its explicit recognition that CCE colleges compete with boycotted colleges like Sherman, (App. B pg. 18a), and despite its explicit finding that in the wake of the boycott, "the fortunes of the anti-diagnostic chiropractic colleges [had] declined"; and that "[t]he enrollment of Plaintiff Sherman College [had] not grown at a time when enrollment at pro-diagnostic institutions [was] increasing" (App B, pg. 14a), the trial court held that the boycott had no anticompetitive effect because the number of CCE colleges had increased, (App. B pg. 18a).

Apparently recognizing the adverse impact of the boycott upon the ultimate

consumer, the trial court acknowledged Sherman's contention that "graduates of anti-diagnostic colleges provide chiropractic services different in kind (and cost) than those provided by graduates of the pro-diagnostic colleges," that "the public will be bilked, ...and that where diagnosis results in a reference to a medical doctor, that any diagnostic procedure will surely be repeated, resulting in a double charge to the patient." (App. B, pg. 22a).

The court also stated:

> Plaintiffs' claims also fail for another reason... Defendants' activities.... are immunized from liability under the Noerr-Pennington doctrine and under the related immunity established for state action in the Parker v. Brown doctrine....(App. B, pg. 20).

7. The court of appeals affirmed,

per curiam, adopting the district court opinion, and denied a petition for rehearing, even though this Court decided Federal Trade Commission v. Indiana Federation of Dentists, ___U.S.___, 106 S.Ct. 2009 (1986), after the district court's decision, but before the appellate court's decision.

REASONS FOR GRANTING THE PETITION

This Court should review the lower court's decision in this case because: (i) it conflicts with long-standing precedent in this court and lower courts regarding the illegality of group boycotts; (ii) it ignores the contradictory holding regarding the rule of reason in FTC v. Indiana Federation of Dentists, supra.; (iii) it is in direct conflict with a recent decision of the Second Circuit and the amicus position of

the United States regarding the reach of the Noerr-Pennington doctrine and the state action doctrine; and (iv) it concerns issues of substantial importance regarding professional self-regulation.

1. A horizontal agreement designed to exclude competitors from a market through a concerted refusal to deal always has been considered a Sherman Act violation notwithstanding that the conspirators continue to compete among themselves and, therefore, there is no obvious anticompetitive effect throughout a defined market. This Court has repeatedly held as much in all of its boycott decisions. See, eg., Klor's Inc. v. Broadway Hale Stores, Inc., 359 U.S. 207, 79 S.Ct. 705 (1959); Fashion Originator's Guild of America, Inc., v. FTC, 312 U.S. 457, 61 S.Ct. 703 (1941);

Radiant Burners Inc., v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961); U.S. v. General Motors Corp., 384 U.S. 127, 86 S.Ct. 1321 (1966).

This Court recently reaffirmed Klor's, at least, as in this case, where the defendants have substantial market power --perhaps eliminating the rigid distinction between the per se rule and the rule of reason. In Northwest Wholesale Stationers Inc. v. Pacific Stationery & Printing Co., ___U.S.___, 105 S.Ct. 2613 (1985), the Court noted:

> "Unless the cooperative possesses market power or exclusive access to an element essential to effective competition, the conclusion that the expulsion is virtually always likely to have an anticompetitive effect is not warranted. See L. Sullivan, Law of Antitrust 292-293 (1977); Brodley, 95 Harv. L. Rev., at 1563-1565."

105 S.Ct. at 2621. The opinion of the

trial court in the case at bar expressly states that defendants had both market dominance and control of essential elements - national testing and accreditation. (App. B)

The lower court's contrary decision in this case also conflicts with recent decisions of other circuits: Va. Academy of Clinical Psychologists v. Blue Shield of Va., 624 F.2d 476 (4th Cir. 1980), cert. denied, 101 S.Ct. 1360; (Holding anticompetitive a rule requiring psychologists to submit bills through psychiatrists. The Fourth Circuit stated: "Forewarned by the decision in National Society of Professional Engineers, supra, that it is not the function of a group of professionals to decide that competition is not beneficial in their line of work, we are not

inclined to condone anticompetitive conduct upon the incantation of good medical practice; at pg. 485); Wilk v. American Medical Assn., 719 F.2d 207 (7th Cir. 1983), cert. denied 104 S.Ct. 2399; (Holding that chiropractors compete with medical doctors, that defendants must show their restraints are the least restrictive, and are justifiable only for specific patient safety as opposed to a general public safety); and U.S. v. Realty Multi-List, Inc., 629 F.2d 1351 (5th Cir. 1980) (Holding that the standards of a multilist company which had the effect of excluding some realtors from membership were anticompetitive and overly restrictive).

In a recent article; "The Rule of Reason - A Catechism On Competition" 55 Antitrust Law Journal 571, Professor

Phillip Areeda responded to the question: "How do we determine whether competition is unreasonably restrained?" Through reference to United States v. Realty Multi-List Inc., 629 F.2d 1351 (5th Cir. 1980); FTC v. Indiana Federation of Dentists, 106 S.Ct. 2009 (1986); NCAA v. Board of Regents of University of Oklahoma, 468 U.S. 85, 104 S.Ct. 2948 (1984); National Society of Professional Engineers v. United States, 435 U.S. 679 (1978); and Northwest Pacific Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co., 105 S.Ct. 2613 (1985), Professor Areeda pointed out that the Court may first determine whether the activity has an anticompetitive effect. Alternatively, the court may determine whether defendants had an anticompetitive purpose. Finally, the Court should

determine whether the restraint is the least restrictive. This approach suggested by Professor Areeda is a shorthand analysis of this Court's holdings in NCAA, supra, and Indiana Federation of Dentists, supra.

Moreover, this Court's rule of reason analysis in those cases is consistent with that in its prior boycott Sherman Act cases. See, eg. Ponsoldt, "The Application of Sherman Act Anti-Boycott Law To Industry Self-Regulation: An Analysis Integrating Non-boycott Sherman Act Cases," 55 S.Calif. L. Rev. 1. Other circuits obviously agree: Va. Academy of Clinical Psychologists v. Blue Shield of Va., supra; Wilk v. AMA, supra; U.S. v. Realty Multi-List, Inc., supra. The evidence in this case and the court's own order show

(1) an anticompetitive purpose, (2) an anticompetitive effect (in that certain forms of competition were eliminated) and (3) that the CCE's standards and defendants' other exclusionary practices were not the least restrictive. In short, there is no justifiable reason for the defendants' intended exclusionary result.

The court, however, excused one defendant, ACA, for having "good intentions." (App. C). The Court so ruled despite uncontroverted evidence of ACA's efforts to prevent graduates of Sherman from taking the NBCE exam, despite ACA's agreements with the CCE that Sherman not be accredited unless it advocated the CCE-ACA allopathic medical concept of chiropractic; despite the

uncontroverted testimony that the respondents were out to exclude any colleges that did not advocate the objective stated in the foreword to the CCE standards (Holman Dep. pg. 90); and despite the uncontroverted evidence that the ACA sponsored a task force meeting attended by ACA officials, NBCE officials, and member colleges of the CCE, to determine how to eliminate colleges like Sherman from the profession.

The court held that the admitted combination was "reasonable" because there was no evidence that it diminished competition throughout the defined relevant market: the number of chiropractic colleges (most of which participated in maintaining the exclusionary CCE standards and other

boycott activity) had increased. In other words, according to the court, the greater the participation in a combination designed to eliminate certain forms of competition, the less likely is that combination to be deemed "unreasonable." Such logic undermines the very foundation and goals of the antitrust laws which, among other things, are to disperse economic power and maintain economic opportunity to promote an ongoing efficient competitive process, thereby enhancing consumer welfare.

To underscore its radical departure from the rule of law established by this Court, the lower court announced that Klor's Inc., v. Broadway Hale Stores, Inc., 359 U.S. 207, 79 S.Ct. 705 (1959) is no longer good law, (R18-904) and virtually ignored Northwest Wholesale

Stationers Inc. v. Pacific Stationary & Printing Co., ___U.S.___, 105 S.Ct. 2613 (1985) and United States v. Realty Multi-List, Inc., 629 F.2d 1351 (5th Cir. 1980).

2. Petitioners contended that respondents' conduct should be deemed unreasonable under the Sherman Act not only because it was an intentionally exclusionary boycott but also because it was an agreement among competitors not to compete with respect to alternative services provided to consumers: the defendants specifically agreed that they would not compete for business by offering "straight" (and therefore less "comprehensive") chiropractic services. Their motive obviously was to expand the services they provided into the practice of medicine and thereby enhance revenues.

The lower court held that this intentional agreement not to offer, or allow others to offer, "straight" chiropractic to consumers was not unreasonable because there was no decrease in the number of chiropractors and chiropractic colleges throughout the market. In other words, the Court measured "competition" by the overall number of competitors, not by the types of services offered to consumers.

Such a holding directly conflicts with FTC v. Indiana Federation of Dentists, supra, decided after the district court's opinion but before that of the court of appeals. In Indiana Federation of Dentists, this Court held:

> The Federation's collective activities resulted in the denial of the information the customers requested in the form

> that they requested it, and forced them to choose between acquiring that information in a more costly manner or foregoing it altogether. To this extent, at least, competition among dentists...was restrained.

106 S.Ct. at 2017.

It is apparent that the court of appeals has chosen to disregard Indiana Federation, which was at the heart of petitioners' appeal to that court regarding the test of "reasonableness" under the Sherman Act.

3. The holding of the court below that the exclusionary accreditation standards of the CCE and efforts to create those standards became protected lobbying under the Noerr-Pennington doctrine and state action doctrine is in direct conflict with Indian Head, Inc. v. Allied Tube & Conduit, ___F.2d.___,1987-1 Trade Cases paragraph 67,547 (2nd Cir.

1987), with the amicus position of the United States as recently presented to the Second and Ninth Circuits, and with this Court's application of the Noerr-Pennington Doctrine.

In ruling in favor of the defendants, the lower court did not find insufficient evidence of a conspiracy to exclude Sherman College. What the court held was that even if the defendants' conspiratorial activities which exclude Sherman had been unreasonable, "[p]laintiffs' claims also fail for another reason" (Jan 9, 1986 Order p. 13) - that defendants activities were "immunized from liability under the Noerr-Pennington doctrine[4] (Jan. 9, 1986 Order p. 13).

With respect to the

4. The district court briefly referred also to the "state action"

Noerr-Pennington doctrine, the court discussed that it did not think the sham exception or co-conspirator exception to the doctrine were applicable to the facts in the case. The court did not consider whether the Noerr defense should apply in the first place to protect the respondents' broad range of activities. It did not discuss the elements of the Noerr-Pennington doctrine which a defendant must prove in order to raise the lobbying defense. It did not discuss

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Fn. 4 continue: doctrine established by the Court in Parker v. Brown, 317 U.S. 341 (1943). However, the court's opinion fails to address the doctine separately except by brief reference, and fails to attempt to apply the "two pronged" test in Southern Motor Carriers Rate Conference v. U.S., ___ U.S. ___, 105 S.Ct. 1721 (1985) to the facts of this case. Thus, it would appear that in fact, the court did not rely on the doctrine.

the fact that the CCE standards and numerous other boycott activities were anticompetitive and were not lobbying.

The trial court gave Noerr-Pennington immunity to the CCE standards and underlying conduct leading to the standards, which were promulgated by competing private chiropractic colleges, simply because CCE accreditation status was relied upon in the regulations and statutes of state boards and legislatures. This application of the Noerr-Pennington doctrine is in direct conflict with the recent opinion of Judge Lumbard of the Second Circuit in Indian Head, Inc. v. Allied Tube & Conduit Corp., ___F.2d___, 1987-1 Trade Cases paragraph 67,547 (2nd Cir.1987). Nothwithstanding the expansive role of private professional

standard-setting organizations, the Second Circuit held that proper and consistent development of the law should reject Noerr immunity for standard-setting and non-lobbying practices of such organizations.

As stated in a recent law review article written by a senior staff attorney for the Federal Trade Commission, there are two reasons why the Eleventh Circuit's unexplained expansion of Noerr immunity to private standard-setting and private conduct of private professional groups is unsound:

> First, although it has never expressly decided the issue, the Supreme Court has reviewed cases involving efforts to influence private standards-setting organizations and has not held such conduct immune. For example, American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp. and Radiant Burners, Inc. v. Peoples Gas Light & Coke

Co., both held that the activities of private standard-setting organizations fall within the antitrust laws. In each, the antitrust plaintiff claimed that arbitrary or unfairly reached organizational decisions restrained competition and harmed him. Nonetheless, the Court neither declared any general policy of immunity for the organization or its dominant members nor considered whether there was sham petitioning; instead, the Court simply applied the principles of competition policy directly. The disposition of these cases is consistent with the dicta in lower court cases that Noerr "immunizes only those actions directed toward govermental agencies or officials.

Second, professional and standards-setting organizations are not governmental within the rationale of Noerr. Neither an organization's membership nor its leadership is elected by or answerable to the body politic. Although some organizations may seek to advance the public interest, it is the industry's or profession's conception of the public interest that they promote...

Hurwitz, "Abuse of Governmental Processes, the First Amendment, and the Boundaries of Noerr " 74 Geo. L.J. 65, at 91 (1985).

In its appeal to the United States Court of Appeals to the Eleventh Circuit in this case, petitioner Sherman emphasized that the hallmark of defendants' antitrust violation was the anticompetitive standards of the CCE (and collusive behavior underlying those standards) which are not even arguably protected lobbying under the Noerr-Pennington doctrine. Plaintiffs submitted to the Eleventh Circuit copies of the Amicus Curiae briefs filed by the United States Department of Justice and the Federal Trade Commission in Indian Head, Inc. v. Allied Tube & Conduit Corp., ___F.2d___,1987-1 Trade Cases

paragraph 67,547 (2nd Cir. 1987); and in Sessions Tank Liners, Inc., v. Joor Manufacturing, Inc., et al., Nos. 86-6208, 86-6470 (9th Circuit), which argued the exact point of law - that Noerr-Pennington immunity does not apply to private standard setting activity.

The Eleventh Circuit refused to consider the briefs and returned them to counsel saying they were inappropriate authority.

Soon thereafter, on March 27, 1987, the Eleventh Circuit entered its per curiam affirmance of the lower court's opinion. This per curiam decision is in direct conflict with the subsequent April 22, 1987 written opinion of Judge Lumbard in Indian Head, supra. Adopting the amicus position of the United States, the Second Circuit held:

> We decline Allied's invitation to extend Noerr-Pennington immunity to lobbying activities directed toward a 'quasi-legislative' body such as the NFPA...
>
> As the Supreme Court stated in Town of Hallie v. City of Eau Claire, 471 U.S. 34, 45 (1985), '[w]e may presume, absent a showing to the contrary, that [a government] acts in the public interest. A private party, on the other hand, may be presumed to be acting primarily on his or its own behalf

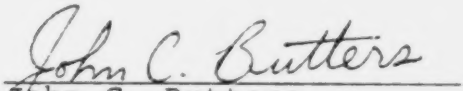
1987-1 Trade Cases at pgs. 60,315 and 60,316.

Nearly identical efforts of a professional organization to expand Noerr-Pennington immunity were also recently rejected by the Third Circuit opinion of Chief Judge Gibbons, in Pa. Dental Ass'n. et al. v. Medical Services Ass'n of Pa., et al., 815 F.2d 270 at 277 (3rd Cir. 1987).

CONCLUSION

Petitioners respectfully request that this Court grant this Petition for a Writ of Certiorari.

Respectfully submitted,



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FOOTNOTES

[1]Although most states, by statute or board rule, require graduation from a CCE accredited college to be eligible for licensure, the CCE's standards which require the colleges to teach the medical objective are inconsistent with the state statutes defining the scope of practice of medicine and statutes defining the scope of chiropractic.

Recently, the Georgia Office of the Attorney General clearly pointed out that chiropractors are limited to straight chiropractic and that the statutory provision requiring graduation from a CCE accredited college cannot be viewed as legislative authorization of the mixer form of chiropractic. In pertinent part in Op. Atty. Gen. 34-53, the Georgia Attorney General in August, 1984 stated the following in response to an inquiry from the State Examining Board:

> In 1978, the General Assembly amended the Chiropractic Practice Act to require licensees to have graduated from a chiropractic college having status with the Council on Chiropractic Education (CCE) or a college having equivalent standards. (1978 Ga. Laws, p. 2050.) This change, however, did not expand or broaden the scope of practice of chiropractic in the State of

Georgia ...[T]he teachings of approved chiropractic schools are not controlling because the practice of chiropractic is subject to the control of the legislature. See Bauer v. State, 227 S.E. 2d 195 (Ga. S.Ct. 1976).

It is recognized that the public can obtain vitamins and nutritional supplements from various retailers, including health food stores. However, the retailer does not hold himself out as being engaged in the practice of one of the healing arts. Chiropractors, on the other hand, do so hold themselves out and are subject to the restrictions placed on the practice of chiropractic by the Chiropractor Practice Act. O.C.G.A. Sections 43-9-1 and 43-9-16.

With respect to the allegations of Sherman College in the present case the trial court stated erroneously that "the parties did not address the issue of whether the administration of general diagnostic tests by chiropractors would or does violate scope of practice violations in the various states" (Order, p 7,A.7). To the contrary, this issue was addressed by plaintiffs in numerous briefs to the trial court, and the trial court refused to admit into evidence copies of state statutes on scope of practice (Tr. vol. 6. pg. 887-890).

The following is representative of state laws on scope of chiropractic:

In Attorney General v. Beno, Mich. Ct. App. Docket No. 61368 (1983), (Apendix B to Brief of Plaintiffs-Appellants in Sherman College of Straight Chiropractic Association, et al, Eleventh Circuit, No. 86-8226) the court rejected the argument that chiropractors should be permitted to engage in general medical diagnosis to determine problems untreatable by chiropractic. In part the Court in Beno, said:

> "...[A] chiropractor is not trained in discerning abnormalities in a patient's heart and lungs, or in interpreting a urinalysis report. If a chiropractor is concerned about the patient's general physical condition, he should refer the patient to a physician trained in such matters.
>
> It is true, as defendant notes, that many of the differential diagnostic techniques are not, in and of themselves, dangerous to the patient. However, the potential harm occurs because the patient may be led to believe that the chiropractor

> is capable of detecting health ailments unrelated to the spine. Thus, the patient may believe that no other physical problems exist and may fail to seek appropriate medical care."

at pgs. 5-6.

"Chiropractic" has been defined as the detecting and correcting of subluxations by adjustment of the spinal vertebrae by manipulation. 16 ALR 4th 58, 62-63; 61 Am. Jur. 2d Physicians, Surgeons, and other healers section 5.

Licensed chiropractors lack authority to diagnose for other than the limited purpose of determining whether the patient is suffering from a condition for which chiropractic is an appropriate method of treatment. See, People v. Machado, 99 Cal. App. 702, 279 P. 228 (1929) which upheld a conviction of practicing medicine without a license of a chiropractor who diagnosed a child's condition as pneumonia.

The court in Howe v. Smith, 203 Pa. Super 212, 199 A.2d 521 (1964) held that chiropractors were not authorized to engage in the general diagnoses of diseases. The decision in Howe, supra, was followed in Commonwealth Dept. of

Transp. Hearing Board v. Pennsylvania Chiropractors Society, 22 Pa. Cmwlth. 483, 349 A.2d 509 (1976) where the Court rejected a contention that general diagnosis authority was conferred by a statutory amendment which permitted chiropractors to engage in "chiropractic diagnosis".

In Kuhl v. Arkansas State Board of Chiropractic Examiners, 236 Ark. 58, 364 S.W.2d 790 (1963), the Court held that licensed chiropractors who indicated that they could diagnose many diseases, including cancer by urinalysis were engaged in the unlawful practice of medicine.

The Court in Kentucky Association of Chiropractors, Inc. v. Jefferson County Medical Society, 549 S.W.2d 817 (1977) held that chiropractors were not permitted to utilize the services of medical laboratories for diagnostic purposes. The Court said that the statutory definition of chiropractic as the science of locating and adjusting subluxations did not authorize the collection of human specimens for submission to a medical laboratory.

In ordering that chiropractor who took throat cultures and urine samples from his patients be bound over to stand trial on a charge of practicing medicine without a

license, the court held in People v. Bovee, 92 Mich. App. 42, 285 N.W.2d 53 (1979) that such diagnostic procedures did not come within the pre-view of a statute that authorized the practice of chiropractic, which was defined to include the manual adjustment of misaligned or displaced spinal vertebrae, and procedures preparatory to such an adjustment. Although it was contended that the use of throat cultures and urine samples for analytical purposes was necessary in order to determine whether patients were suffering from ailments that were amenable to chiropractic treatement, the court said that it failed to see how the use of such procedures would reveal the existence of misaligned or displaced vertebrae. It did not believe, the court said, that the legislature intended to authorized chiropractors to employ general diagnostic techniques, but only those techniques that might reveal the existence of problems that were treatable by chiropractic.

Diagnostic laboratory services and diagnostic X-rays of bodily portions other than the spine ordered or performed by a chiropractor were not within the scope of chiropractic as established by statute, the court held in Cotter v Blue Cross & Blue Shield 94 Mich. App. 129, 288 N.W.2d 594 (1979), and thus were

properly excluded from coverage under the terms of the subscribers' contract with Blue Cross and Blue Shield. Under the provision of the insurance contract pertaining to reimbursement for services rendered by physician to the extent that he rendered services he was legally qualified to perform under the chiropractic statute. Stating that the key issue was whether or not chiropractors were authorized under the statute to perform the services the insurer wished to exclude from coverage, th court, citing People v. Bovee, 92 Mich App 42, 285 NW2d 53 (1979), stated that such diagnostic services were not within the scope of chiropractic as defined by statute. Thus, a chiropractor performing the services did not fall within the contract definition of "physician," the court said, ad the insurer was not obligated under the contract to pay for their services.

In Spunt v. Fowinkle, 572 S.W.2d 259 (1978), an appellate Court in Tennessee held that diagnostic procedures including drawing and analyzing blood, making Pap smears, and giving complete physical examinations was the unlicensed practice of medicine.

The Court in State v. Wilson, 11 Wash App. 916, 528 P.2d 279 (1974) upheld an injunction prohibiting a licensed chiropractor

from taking blood samples for diagnostic purposes.

In upholding the revocation of a chiropractor's license, the Court in In Re Stockwell, 28 Wash. App. 295, 622 P.2d 910 (1981) held that the use of urinalysis to diagnose cancer was beyond the scope of chiropractic. See also, Bauer v. State, 227 S.E.2d 195 (1976) which forbade the use of diagnostic devices. See generally, 16 ALR 4th 58.

APPENDICES

APPENDIX

SHERMAN COLLEGE OF STRAIGHT CHIROPRACTIC; Straight Chiropractic Aademic Standards Association, Inc., a Pennsylvania Corporation, Plaintiffs-Appellants.

v.

AMERICAN CHIROPRACTIC ASSOCIATION, INC., the Council on Chiropractic Education, Inc., National Board of Chiropractic Examiners, and Sid E. Williams, Defendants-Appellees.

No. 86-8226.

United States Court of Appeals, Eleventh Circuit.

March 27, 1987.

Appeal from the Untied States District Court for the Northrn District of Georgia; Orinda D. Evans, Judge.

Before TJOFLAT and HILL, Circuit Judges, and LYNNE*, Senior Distirct Judge.

PER CURIAM:

Oral argument was heard in this case in Atlanta, Georgia on November 19, 1986. The record, briefs, and arguments of counsel have been carefully considered. The judgment of the district court is affirmed on the basis of the order of the Honorable Orinda D. Evans, dated and filed January 9, 1986, published as Sherman College v. American Chiropractic Association, Inc. ___F.Supp.___(N.D.Ga.

1987).

*Honorable Seybourn H. Lynn, Senior U.S. District Judge for the Northern Distirct of Alabama sitting by designation.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

SHERMAN COLLEGE OF STRAIGHT CHIROPRACTIC, STRAIGHT CHIROPRACTIC ACADEMIC STANDARDS ASSOCIATION, INC., WILLIAM SUKOVITCH and MICHAEL KUDLAS	:	
vs.	:	Civil No. C81-1767
AMERICAN CHIROPRACTIC ASSOCIATION, INC., THE COUNCIL ON CHIROPRACTIC EDUCATION, INC., NATIONAL BOARD OF CHIROPRACTIC EXAMINERS, and SID E. WILLIAMS	:	

ORDER

This antitrust action is brought under §§4 and 16 of the Clayton Action, 15 U.S.C. §§ 15 and 26, to redress injuries allegedly sustained by Plaintiffs Sherman College of Straight Chiropractic ("Sherman College") and Straight Chiropractic Academic Standards Association, Inc. ("SCASA") as a result of Defendants' violations of §§1 and 2 of

the Sherman Act, 15 U.S.C. §§1 and 2. The case is before the court for findings of fact and conclusions of law, having been tried without a jury in March of 1985.

Findings of Fact

The evidence presented at trial-- especially the documentary evidence-- was voluminous. Nonetheless, most of the facts are undisputed and in any event are not as complex as the length of the record might indicate. The court's findings of fact are as follows:

Plaintiff and Defendants respectively are adherents of two different schools of thought within the chiropractic profession. Defendants assert that chiropractors should be primary health care providers who diagnose disease, in addition to

performing spinal analysis and manipulation. Therefore, Defendants believe that chiropractic education should include training in general diagnostic procedures. They contend the public is better served when chiropractors can identify possible medical problems and if necessary refer the patient to another health care provider. Plaintiffs, on the other hand, assert that chiropractors should limit themselves to procedures associated with identifying and correcting misalignments of the spinal vertebrae. They contend that chiropractors lack the broad medical education necessary to effectively diagnose medical ailments, and that the administration of diagnostic tests by chiropractors for possible referral purposes is dangerous and imposes

needless charges on patients. Both Plaintiffs and Defendants agree that correcting vertebral misalignments contributes in a significant way to the human body's ability to maintain health.

Over the past ten to fifteen years, the pro-diagnostic forces have achieved dominance in the profession. This has occurred to a great extent through the sponorship of Defendant American Chiropractic Association, Inc. ("ACA"), the primary professional organization for chiropractors in the United States. In 1971 ACA formed Defendant Council on Chiropractic Education, Inc. ("CCE") as a specialized accrediting agency for chiropractic colleges. Since then, ACA has backed CCE financially. CCE will only accredit chiropractic colleges which subscribe to the pro-diagnostic

philosphy. Mainly for this reason, CCE declined to grant accreditation to Sherman College in 1974.

CCE's Educational Standards and Policies assign central importance to training future doctors of chiropractic in the skills of performing a diagnosis. The foreword to the standards states:

> The purpose of professional education is to prepare the doctor of chiropractic as a primary health care provider. As a portal of entry to the health delivery system the chiropractic physician must be well educated to diagnose, including, but not limited to, spinal analysis, to care for the human body in health and disease, to consult with, or refer to, other health care providers. It is this concept of the chiropractic physician which serves as a basis for interpretation of the Educational Standards for Chiropractic Colleges.

CCE's standards and policies require chiropractic students to be taught, both

by didactic and clinical means, to perform a full body screening examination, using a patient history, physical examination, and appropriate diagnostic aids, which may include x-rays and laboratory tests. See Defendants' Exhibit 29, "Educational Standards for Chiropractic Colleges," Sec. III, pp. 17 and 23, and Sec. IV, pp. 17-19. While this diagnostic examination apparently differs in certain respects from an examination of a medical doctor, it must be sufficient at least to identify the existence of an abnormality in any part of the body. See Defendants' Proposed Findings of Fact, p. 24. According to CCE standards, the purpose of the examination is not solely to prepare the way for chiropractic treatment, but also to identify any need for consultation

with or referral to medical doctors and other practitioners within the general health care system. Id.

Through lobbying efforts, ACA and CCE have persuaded most states to permit only graduates of pro-diagnostic schools to become licensed chiropractors. In some states this has required legislative action, but in most states chiropractic licensing boards have done this by regulation. One form of such regulation states that only graduates of institutions accredited by CCE may apply for licensure. Other regulations are worded differently, but in application most operate to exclude graduates of antidiagnostic colleges. For example, some states allow licensure only to graduates of schools "accredited by an agency recognized by the U.S. Department

of Education." CCE is the only accrediting agency for chiropractic schools which has ever applied for or obtained recognition from the U.S. Department of Education.

At relevant times, ACA and CCE have had a close relationship with the Federation of Chiropractic Licensing Boards ("FCLB"), an organization to which all members of state licensing boards belong. Representatives of these three organizations have held joint meetings to discuss various matters of mutual interest, including problems created by the non-conforming anti-diagnostic colleges. For example, at the request of CCE in 1974, FCLB passed a resolution urging members of the state licensing boards to require graduation from a CCE-accredited institution as a condition

of licensure. Additionally, a number of individuals served in leadership positions in more than one of these organizations, sometimes simultaneously.

The court infers that most state chiropractic licensing boards were predisposed to grant requests by CCE and FCLB to permit only graduates of pro-diagnostic institutions to become licensed chiropractors. This is clear from the fact that in 1974 FCLB--whose general membership consists of the state licensing boards and board members--passed the recommendation urging the state boards to allow licensure only to graduates of pro-diagnostic institutions. This was at the time when ACA and CCE began their campaign to lobby the state boards. Also, the fact that ACA has undertaken such aggressive,

continuing efforts to promote pro-diagnostic philosophy reflects the existence of a broadbased commitment by the profession to that philosophy. Therefore, it is clear that in addressing the chiropractic members of the licensing boards on this subject, ACA and CCE were--if not actually "preaching to the converted"--addressing a very receptive audience. However, there is no evidence that any agreements were reached or any commitments made prior to the public hearings which were held by the various boards on limitation of licensure. Insofar as the record reflects, formalities and proper procedures were observed.

Both CCE and FCLB sought the enactment of various CCE requirements by Defendant National Board of Chiropractic

Examiners ("NBCE"), an organization which developes and administers national chiropractic examinations. All states use the NBCE examination in some way in determining whether to license applicants to practice chiropractic. The directors of NBCE are selected through a combination vote/appointment process controlled by FCLB. Through threats of antitrust litigation, Sherman successfully averted the efforts of ACA, CCE and FCLB in 1978 to get NBCE to permit only graduates of CCE accredited schools to take the national chiropractic exam. However, CCE was successful in getting NBCE to allow only faculty members of CCE approved schools to submit proposed examination questions.

In the wake of ACA's, CCE's and FCLB's successful campaign to make

diagnosis a fundamental aspect of chiropractic training, the fortunes of anti-diagnostic chiropractic colleges have declined. The enrollment of Plaintiff Sherman College has not grown at a time when enrollment at pro-diagnostic institutions is increasing. Sherman's graduates can become licensed chiropractors in only 11 states.

Plaintiffs' basic contention at trial was that Defendants ACA, CCE, and NBCE conspired with the FCLB and various state licensing boards to restrict Plaintiffs' ability to compete within the chiropractic profession. The restriction allegedly occurred through control of access to chiropractic accreditation, examination, and licensing. Plaintiff Sherman College seeks to collect damages

equal to three times the net revenues it contends it has lost as the result of Defendants' alleged antitrust violations. Plaintiff SCASA presented no proof of damages. Both Sherman College and SCASA seek injunctive relief against future violations of the antitrust laws.

Defendants denied that there was any conspiracy or improper restriction. Secondly, they argued that any actions taken by them which will better educate the chiropractic profession and promote better health care for chiropractic patients. Defendants also contended that any actual harm to Plaintiffs occurred as a result of the independent actions of state legislative or administrative bodies and as a result of protected lobbying activity, and therefore cannot serve as the basis for an antitrust suit

against Defendants. Defendants dispute Sherman College's claimed damages, contending that they were unduly speculative.

Conclusions of Law

The court makes the following conclusions of law:

The antitrust laws are concerned with protecting competition, not competitors. Alameda Mall, Inc. v. Houston Lighting & Power Co., 615 F.2d 343, 354 (5th Cir.), cert. denied, 449 U.S. 870 (1980). It is therefore critical to identify the consumer interests which are at stake. This requires identification of the product and those who consume it. In the instant case, a lack of clarity exists because Plaintiffs have not identified what product has been the object of

Defendants' alleged anti-competitve activities.

Nonetheless, the court will analyze Plaintiffs' claims from the standpoint of two possible products: chiropractic education and chiropractic health care services. Most of Plaintiffs' evidence appears to have been addressed to restriction or regulation of chiropractic education. It is this restriction, the court concludes, that has had the most direct impact on Sherman's continued growth as a chiropractic college.

Looking at the case in this way, the consumers of chiropractic education are those students who aspire to attend or who do attend chiropractic colleges. The evidence showed that within the United States there are presently about seventeen chiropractic colleges, two of

which (including Sherman College) adhere to the anti-diagnostic philosophy; the others are all pro-diagnostic. The court will assume that these chiropractic colleges compete with each other to attact and hold tuition-paying students.

Because Plaintiffs have presented no evidence of diminished competition in the chiropractic education market, it is critical to determine whether Plaintiffs' claim should be evaluated under the rule of reason or rather, under the "per se" rule. If the per se rule applies, then Plaintiffs need not demonstrate, by quantifiable evidence, that competition in a relevant market has been diminished. NCAA v. Board of Regents, __U.S.__,104 S.Ct. 2948, 2960-62 (1984). On the other hand, if a rule of reason analysis is appropriate, then Plaintiffs' failure to

prove actual anti-competitive effect in a relevant market is fatal to their case. Jefferson Parish Hospital Dist. No. 2 v. Hyde, __U.S.__,104 S.Ct. 1551, 1567-8 (1984).

The per se rule is appropriately applied where the nature of Defendants' activities is inherently anti-competitive and without redeeming societal value. Broadcast Music v. CBS, 441 U.S. 1, 8-10 (1979), but cf Arizona v. Maricopa Medical Society, 457 U.S. 332 (1982) (emphasizing need to limit inquiry to nature of arrangement between defendants). A case involving a concerted refusal to deal does not automatically invoke application of the per se rule. Northwest Wholesale Stationers, Petitioner, v. Pacific Stationery and Printing Company,

__U.S.__,105 S.Ct. 2613 (1985).

The court concludes after consideration that Plaintiffs have failed to make the threshold showing necessary to invoke application of the per se rule. The evidence showed that the number of schools of chiropractic has increased from nine schools in 1971 to seventeen schools today. Those schools of chiropractic which offer a pro-diagnostic course of study offer courses in diagnostic procedure in addition to the basic chiropractic education courses. Regulation of curriculum is an activity which is inherently appropriate for an accrediting body. The court will not assume that extra courses in diagnosis are valueless to a student of chiropractic. The court concludes, therefore, that any restraint imposed by

Defendants' alleged anti-competitive activities may not be evaluated under the per se rule. Accordingly, Plaintiffs' failure to prove actual diminution of competition is fatal to their claim, assuming that the relevant product is chiropractic education.

This action might also be viewed from the standpoint of the patient public as consumers of chiropractic services. In an indirect sense, Sherman College is a supplier of these services in that it produces practitioners who ultimately supply the service. Plaintiffs' argument is necessarily that graduates of anti-diagnostic colleges provide chiropractic services different in kind (and cost) than those provided by graduates of the pro-diagnostic colleges. Thus, Plaintiffs' argument is that the

interests of the consumer public are impaired when it is denied access to "straight" or anti-diagnostic chiropractors. The specter raised by Plaintiffs is that the public will be bilked by having to pay for diagnostic procedures which cannot be properly evaluated except by medical doctors. They point out that where diagnosis results in a reference to a medical doctor, that any diagnostic procedure will surely be repeated, resulting in a double charge to the patient. In cases where no referral is made because the chiropractor concludes that there is no problem, Plaintiffs argue there is danger in the patient's relying on such diagnosis. With no alternative access to chiropractors who do not perform diagnostic tests, Plaintiffs argue,

consumers will be forced to accept diagnostic services from chiropractors which they might not otherwise choose to accept. Hence, Plainiffs argue that the anti-competitive design of Defendants' activities is so clear that no actual proof of diminished competition is necessary.

Nonetheless, after consideration the court declines to apply the per se rule in this case. Antitrust cases involving the impact of professional educational standards on the consumer public are more appropriately analyzed under the rule of reason See Wilk v. AMA, 719 F.2d 207, 221-2 (7th Cir. 1983). Professions are different in certain respects from commercial businesses. National Society of Professional Engineers v. United States, 435 U.S. 679, 696 (1978);

Goldfarb v. Virginia State Bar, 421 U.S. 773, 788-89, n.17 (1975); Wilk, 719 F.2d at 221-2. Restrictions on access by imposition of educational and training requirements and a degree of self-regulation are definitional aspects of the term "profession." See, AMA v. United States, 130 F.2d 233, 246-48 (D.C. Cir. 1942). While a profession certainly could undertake a regulatory measure which would disserve the public interest, the general presumption is that the public interest is served by the promotion of enhanced education and training requirements. Secondly, there is danger in a court's presuming without evidence that the effects of higher educational standards will be adverse to the consumer public. The matter of what training is relevant and appropriate in a

given profession is not likely susceptible to intelligent use of facial presumptions. In this case, therefore, the court will not presume that education in diagnostic procedures lacks any possible relevance to quality chiropractic care.

Plaintiffs have further argued that even if a rule of reason applies, they are entitled to prevail. However, the court finds that the evidence does not preponderate in favor of a finding of unreasonable anti-competitive effect. There is no evidence in the record as to what impact the increased educational requirements for chiropractors has had or likely will have on the nature and cost of chiropractic services. The record does not reflect what type of diagnostic procedures are actually being performed

by chiropractors. It is unclear whether chiropractors as a group have enough power in the patient market to deprive patients of the right to choose not to receive diagnostic services. Finally, the court is unwilling to hold in the absence of evidence that the public interest is prejudiced by the use of any diagnostic procedures by chiropractors.

Plaintiffs' claims also fail for another reason. As previously noted, those states which have excluded graduates of anti-diagnostic institutions from becoming licensed chiropractors have done so either by legislative or administrative act. Defendants' activities in persuading these official state bodies to so act are immunized from liability under the Noerr-Pennington doctrine and under the related immunity

established for state action in the Parker v. Brown doctrine. Though certain exceptions to these immunity doctrines have been recognized by the court, no exception applies under the facts of the instant case.

The Noerr-Pennington doctrine establishes an immunity from antitrust liability for genuine political lobbying of governmental officials. In Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961), a group of railroads conducted a misleading political campaign in Pennsylvania to gain passage of laws that would limit trucks' use of roads for long hauling freight. The Supreme Court held that such conduct was beyond the scope of the Sherman Act:

> The Sherman Act does not prohibit two or more persons

> from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to the law that would produce a restraint or a monopoly.

365 U.S. at 136. The Court was particularly concerned with potential infringement of the First Amendment right to petition:

> A construction of the Sherman Act that would disqualify people from taking a public position on matters in which they are financially interested would..deprive the goverment of a valuable source of information and, at the same time, deprive people of their right to petition in the very instances in which that right may be of the most importance to them.

Id. at 139. The Sherman Act thus regulates only "business activity," not "political activity." Id. at 137.

In United Mine Workers v. Pennington, 381 U.S. 657 (1965), the

Supreme Court reaffirmed the Noerr principal. In Pennington, the large coal companies and the United Mine Workers had successfully persuaded the Secretary of Labor to set a high minimum wage for TVA projects in order to drive smaller coal companies out of the market. The Court held this conduct to be outside the reach of the Sherman Act:

> Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a boader scheme itself violative of the Sherman Act.

381 U.S. at 670.

It is clear in this case that Defendants engaged in political lobbying when they persuaded state legislators and administrative boards to bar graduates of anti-diagnostic colleges from licensure.

In Noerr, however, the Court noted that there may be instances where the political activity "is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified." 365 U.S. at 144. The "sham exception" was clarified in California Motor Transport Company v. Trucking Unlimited, 404 U.S. 508 (1972). The California Motor Transport defendants allegedly conspired to oppose all applications for operating rights filed by their competitors. The Court held that the Noerr-Pennington doctrine did not apply in that instance, because

> "...The allegations are not that the conspirators sought "to influence public officials," but that they sought to bar their competitors from meaningful access to

> adjudicatory tribunals and so to usurp that decisionmaking process.

404 U.S. at 512.

The Court therefore concluded that otherwise valid petitioning activity may be subject to antitrust scrutiny where a "pattern of baseless, repetitive claims" emerges which "leads the fact finder to conclude that the administrative and judicial processes have been abused." 404 U.S. at 513.

In this case, the record fails to disclose a pattern of baseless claims by Defendants before the licensing boards which could support a conclusion that the administrative process was abused. In fact, it is from Defendant's success before the state boards that Plaintiffs claim injury to themselves. Thus, Plaintiffs must rely on their claim that

the licensing boards themselves were members of the conspiracy through the FCLB, thereby rendering Plaintiffs' access to those agencies meaningless and Defendants' activities unprotected.

In Parker v. Brown, 317 U.S. 341 (1943), the Supreme Court specifically reserved the question of the applicability of the Sherman Act to the case of "the state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade." Id. at 351. In United Mine Workers v. Pennington, the Court noted that no antitrust damages could be recovered for "the act of a public official who is not claimed to be a co-conspirator." 365 U.S. at 671.

The Court again noted the existence of a public co-conspirator exception in

California Motor Transport v. Trucking Unlimited, supra, stating: "Conspiracy with a licensing authority to eliminate a competitor may also result in an antitrust transgression." 404 U.S. at 513. In support of this proposition, the Court cited Continental Ore Co. v. Union Carbide and Carbon Corp., 370 U.S. 690 (1962) and Harman v. Valley National Bank of Arizona, 339 F.2d 564 (9th Cir. 1964).

In Continental Ore, the Court found no antitrust immunity for private companies' dealings with a purchasing agent of the Canadian government, where the government agent was alleged to be a co-conspirator in the scheme. 370 U.S. at 706-707. In Harman, the Ninth Circuit held that Noerr did not necessarily bar antitrust liability for the defendants' joint efforts to influence the Attorney

General of Arizona, in pursuit of a monopoly on commercial banking, where the Attorney General had allegedly acted as a participating conspirator in the scheme. 339 F.2d at 566.

More recently, the Fifth Circuit upheld the trial court's application of the public co-conspirator exception in Affiliated Capital Corporation v. City of Houston, 735 F.2d 1555 (5th Cir. 1984) (en banc), affirming 519 F.Supp. 991 (S.D. Tex. 1981), petition for cert. filed sub nom. Gulf Coast Cable Television Company v. Affiliated Capital Corporation, 53 U.S.L.W. 3509 (U.S. Dec. 14, 1984). An unsuccessful applicant for a cable television franchise in Houston had brought suit alleging that the successful applicants and certain officials of the city had conspired in

the award of the cable franchises. The jury found that such a conspiracy existed. The trial court then held that the Noerr-Pennington doctrine was inapplicable under the public co-conspirator exception. 519 F.Supp. at 1016-23. The Court of Appeals affirmed, stating that "numerous examples of official involvement in the conspiracy abound," and that "the actions of the mayor and city council indicate a 'vigorous involvement in orchestrating certain aspects of the conspiracy.'" 735 F.2d at 1567.

The public co-conspirator exception to the Noerr-Pennington doctrine has been critized by certain courts and commentators. In Metro Cable Company v. CATV of Rockford, Inc., 516 F.2d 220 (7th Cir. 1975), the Seventh Circuit refused

to recognize such an exception on the grounds that "such a rule would in practice abrogate the Noerr doctrine." 516 F.2d at 230. The court in Metro Cable did not appear to consider whether a secret conspiracy might completely subvert the policy making process, but instead expressed the fear that any member of a governmental body who simply agreed to support defendants' position would thereby become a "co-conspirator." 516 F.2d at 230.

The Eighth Circuit has also refused to rely on the public co-conspirator exception, noting that it has been subject to criticism. See Fisrt American Title Company v. South Dakota Land Title Association, 714 F.2d 1439, 1446 (8th Cir. 1983), cert. denied, 104 U.S. 709 (1984); Westborough Mall, Inc.

v. City of Cape Girardeau, 693 F.2d 733, 746 (8th Cir. 1982), cert. denied, 461 U.S. 945 (1983). Professor Fischel has argued in a widely noted article that "in most cases the co-conspirator exception is unworkable and should not be recognized." Fischel, Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine, 45 U.Chi.L.R. 80, 115 (1977).

The Third Circuit, however, has recognized the public co-conspirator exception. In Duke & Company, Inc. v. Foerster, 521 F.2d 1277 (3rd Cir. 1975), the Court of Appeals reversed the district court's dismissal of the complaint, holding in part that the Noerr-Pennington doctrine did not shield defendants from antitrust liability:

> Both Noerr and Pennington involved suits against private parties who had allegedly conspired to influence governmental action. In neither case was it alleged that the governmental entity had collaborated to promote the conspiracy. Where the complaint goes beyond mere allegations of official persuasion by anti-competitive lobbying and claims official participation with private individuals in a scheme to restrain trade, the Noerr-Pennington doctrine is inapplicable.

Id. at 1282 (emphasis in original).

Despite this broad language in the Duke opinion, some courts have distinguished Duke on the grounds that it involved alleged misconduct on the part of governmental agencies acting in a proprietary or procurement mode, rather than as a policy making body. First American Title Company, 714 F.2d at 1446. In this case, the state chiropractic licensing boards were clearly acting as

regulatory or policy making bodies, and not as quasi-commercial entities.

There is not precedent in the Eleventh Circuit which expressly considers the public co-conspirator exception. The case outside his circuit which applies the exception to facts most closely resembling this case is Federal Prescription Service, Inc. v. American Pharmaceutical Association, 663 F.2d 253 (D.C. Cir. 1981), cert. denied, 455 U.S. 928 (1982).

In Federal Prescription, a mail order pharmacy brought an antitrust action against the American Pharmaceutical Association ("American"), a national association of pharmacists, alleging that American had conspired with other trade organizations to restrain the plaintiff's mail order prescription

service. Among the alleged co-conspirators were the Iowa Board of Pharmacy Examiners, the National Association of Boards of Pharmacy, and various state pharmaceutical associations associated with American.

The district court found that these organizations had participated in a conspiracy with American to restrain the budding mail order pharmacy industry. The trial court focused on the relationships among the conspirators and on their concerted efforts to suppress the mail order pharmacists.

For example, the National Association of Boards of Pharmacy was found to have participated in the conspiracy by adopting American's resolutions opposing mail order drug distribution and drug advertising and by

sending copies of these to all of its members. The National Association is made up of the members of the state pharmaceutical licensing boards, and plays much the same role in the pharmaceutical profession as the FCLB does in the chiropractic profession. The court also found that the National Association had cooperated in setting up a conference "to determine what steps should be taken to oppose mail order drug distribution." 484 F. Supp. at 1203. At that meeting, "all state boards were asked to use every legal method to oppose the establishment of mail order houses." Id.

The court also found the Iowa Board of Pharmacy Examiners to have been a co-conspirator. The Iowa Board is a governmental body empowered to license

and regulate the practice of pharmacy in the state of Iowa. The members of the board are selected by the governor from a list compiled by the Iowa Pharmaceutical Association, an organization affiliated with American and subject to its Code of Ethics.

The trial court found that the Iowa Board had undertaken a number of unlawful actions against Federal. These findings were summarized in the opinion of the D.C. Circuit:

> The Board first denied Federal's license application, granting it only after being told by the Iowa Attorney General that state law did not prevent issuance of a pharmacy license to a mail order house. Then, in 1964, the Board delayed the grant of Federal's change of address license. The Board also imposed burdensome inspection conditions on Federal, and cooperated with pharmaceutical associations in Iowa and Nebraska in preparing forged prescriptions to be sent

> to Federal. In 1965, on the basis of these filled prescriptions, the Board revoked Federal's pharmacy license, but Federal succeeded in Iowa state court in having the revocation annuled. In 1968 the Board attempted to seize Federal's inventory pursuant to a search warrant, but withdrew the warrant after Federal filed suit to prevent the search and before any seizure was affected. In 1970 the Board withheld Federal's annual relicensing. In 1973 the Board induced the state to seek to have Federal enjoined from filling out of state prescriptions, but the action was dismissed and te Iowa Supreme Court affirmed the dismissal. Finally, in 1966, the Board denied Federal's request to be certified as a suitable employer of pharmacist interns. The reason for the denial, the court found, was that Federal did not belong to the Iowa Pharmaceutical Association.

663 F.2d at 259 (footnotes omitted).

Although the trial court found that the co-conspirators had engaged in a group boycott, the court also found some

of their actions to be beyond the coverage of the Sherman Act under the Noerr-Pennington doctrine. However, the court concluded form the Iowa Board's actions against Federal that the Board's administrative processes had been abused through a conspiracy among American, the Iowa and Nebraska state pharmaceutical associations, and the Board members themselves. American was therefore held liable for the Board's actions under the co-conspirator exception.

On appeal, the Court of Appeals reviewed the evidence and reversed the trial court's finding of conspiracy between American and the state boards. The Court of Appeals therefore concluded that the co-conspirator exception to Noerr was inapplicable, while expressing doubt about the doctrine's validity:

American Telephone & Telegraph, 708 F.2d 1081, 1155 (7th Cir. 1983). This court need not actually determine whether the co-conspirator exception should be recognized, because the court finds that the evidence is insufficient to support its application.

Plaintiff's argument for a conspiracy between the various state chiropractic licensing boards and Defendants is based on their relationship through the Federation of Chiropractic Licensing Boards. Under the FCLB bylaws, all members of chiropractic licensing boards in the state and territories of the U.S. are eligible to become active members of the Federation. Each board becomes a "member board" by paying dues, and the board as a whole has one vote at every meeting of FCLB. The bylaws states

[sic] that the members of each board shall have no vote separate and apart from their board. Any member board may also send a qualified representative to FCLB annual meetings to participate in the deliberations.

The FCLB is managed by a five person executive board, one member of which is selected from each of five geographic districts. The representatives of the member boards vote for director by district at the annual meetings of the FCLB. The president and vice president of the Federation are elected annually by secret ballot; the secretary an treasurer are then appointed.

Resolutions for the Federation's consideration are routinely presented at the February annual meetings and voted upon by the representatives of the member

state licensing boards. However, the evidence shows that the 1974 resolution urging the state boards to pass CCE requirements was adopted at a September 29 meeting of the Executive Board and officers of the FCLB, not at an annual meeting. See Plaintiff Exhibit No. 30.

There is nothing in the FCLB bylaws to indicate that either type of resolution is in any sense "binding" on the member boards. Although certain CCE supporters characterized the resolutions as "pledges" or "commitments" on the part of the boards or board members, this appears to have merely a rhetorical device, and not a reference to an actual obligation. Instead, the testimony as a whole indicates that such resolutions operate as recommendations from the Federation to its member boards with

> It seems doubtful that the existence of a public co-conspirator would explain any result more satisfactorily than one of the more established exceptions to the Noerr doctrine....

663 F.2d at 264, n.11.

The appeals court also found that the evidence of the Iowa Board's "unusually aggressive stance against mail order pharmacy," 663 F.2d at 267, was insufficient to support an inference of conspiracy with American. The court went on to uphold the trial court's other applications of the Noerr-Pennington doctrine.

In this case, the actions of CCE in relation to the state licensing boards are difficult to classify. The burden lies with Plaintiffs to establish that an exception to the Noerr-Pennington doctrine applies. MCI Communications v.

respect to those particular matters of chiropractic policy.

Plaintiffs' theory as to how the state licensing boards became co-conspirators through the FCLB is not completely clear. Plaintiffs' proposed findings of fact suggest at one point that it is only the members of state boards who support the 1974 FCLB resolution who have joined the conspiracy. Plaintiffs' Proposed Findings of Fact 278. However, as noted above, the state boards themselves did not vote on that resolution. Futhermore, the evidence fails to identify which states voted in favor of any other resolutions which Plaintiffs find restrictive. Elsewhere in the pleadings and at trial, Plaintiffs took the position that the licensing boards' mere

membership in the FCLB sufficiently implicates them in the alleged effort to restrain the anti-diagnostic faction.

The D.C. Circuit considered virtually an identical situtation in Federal Prescription, supra. State pharmaceutical board members automatically became members of the National Association of Boards of Pharmacy, and delegates from those state boards determined the policies of the National Association. Those policies included asking "all state boards...to use every legal method to oppose the establishment of mail order houses." 663 F.2d at 258. Furthermore, many state boards are made up of members of the state pharmaceutical associations, who have a dominant voice in determining the policy of the American Pharmaceutical

Association. Finally, American apparently boasted that sixteen state boards had responded to its request that cease and desist orders be issued against mail order pharmacies. Id. at 265.

The Court of Appeals held as a matter of law that this evidence failed to show that the state board members had participated in a conspiracy with American. The court stated:

> First, as to American's communications to the state boards, we decline to assign probative value to the fact that some state boards responded favorably...It would make a nullity of Noerr to hold the state board to be a co-conspirator, and the petitioning activity directed at it thus unprotected, on the basis that the petitioning was successful. That a public official is persuaded by the entreaty of a lobbyist does not make him the lobbyist's co-conspirator.

663 F.2d at 265.

For similar reasons, the Federal Prescription court refused to treat the evidence of overlapping membership as probative of conspiracy. The court stated:

> Mere membership in associations is not enough to establish participation in a conspiracy with other members of those associations, much less in a conspiracy between those associations in yet another association.

Id. at 265. (citation omitted). The court also refused to impose liability against American on the basis of a "membership ratification" theory, and rejected the district court's findings that the Iowa Board's aggressive stance against mail order pharmacy was evidence of an unlawful conspiracy with American. The court stated:

> The behavior of the Iowa Board in this case is not of the kind that could only make sense in

> the context of the behavior of others; rather, it can be persuasively explained by the exercise of rational, independent judgment.

663 F.2d at 267.

The D.C. Circuit thus emphasized that proof of a conspiracy with a state agency requires that the evidence show more than just successful lobbying by the defendants and common membership in professional associations. The opinion in Federal Prescription indicates that the evidence must show true complicity on the part of the governmental body or bodies for the co-conspirator exception to apply. This conclusion is consistent with the general rule in this circuit that exceptions to the Noerr-Pennington doctrine must be construed narrowly. Mid-Texas Communication v. A.T. & T., 615 F.2d 1372, 1384 (5th Cir. 1980).

The connection between the actions of the FCLB and the state licensing boards is too tenuous to give rise to an inference of unlawful agreement. Although the state boards are obviously not wholly independent of the FCLB, the evidence fails to reveal any evidence of interaction between the state licensing boards or their members, on the one hand, and the FCLB and other alleged conspirators, on the other hand, which went beyond petitioning through appropriate channels. As the Federal Prescription court stated:

> A different case would result were it shown that state board members were bribed by American, or met in an unlawful fashion with its officers, or otherwise induced by American, by means other than legitimate lobbying and publicity, to take action against mail order houses. Evidence of this sort does not appear on the record.

663 F.2d at 266 (emphasis in original).

The co-conspirator exception is therefore inapplicable in this case. Defendants' appearances and other communications to the state chiropractic licensing boards thus qualify as protected petitioning activity, and may not serve as the basis for antitrust liability.

The court therefore finds that Plaintiffs have failed to establish a violation by Defendants of §1 of the Sherman Act. For the reasons set forth above, the court also finds that Plaintiffs have failed to establish that Defendants monopolized or conspired to monopolize any relevant chiropractic market in violation of §2 of the Act. The court therefore DIRECTS that judgment be entered in favor of Defendants The

Council on Chiropractic Education, Inc. and the National Board of Chiropractic Examiners.

SO ORDERED, this 9th day of January, 1986.

Oridna D. Evans
United States District Judge

FOOTNOTES 1 THROUGH 9

1 No evidence was adduced at trial regarding the claims of Plaintiffs Sukovitch and Kudlas, who apparently are graduates of Sherman College and practicing chiropractors. The motion to dismiss of Defendant American Chiropractic Association was granted at the close of Plaintiff's evidence. Judgment was entered in favor of Dr. Williams in a separate order entered April 16, 1985.

2 In 1974, CCE secured recognition as a nationally recognized accrediting agency by the United States Office of Education ("USOE"), the predecessor to the present Department of Education. CCE was determined to be a "reliable authority as to the quality of training offered" by educational institutions. See 20 U.S.C. §1141(a). The principal purpose of federal recognition is to establish a mechanism for screening schools for participation in federal aid programs. See 34 C.F.R. §603.1. CCE's recognition was renewed in 1975, 1979 and 1982, and will be up fo renewal again in 1986.

In 1979, Sherman College challenged the USOE's renewal of CCE's recognition on the grounds that CCE failed to represent the profession as a whole. The renewal was subsequently upheld by the United States District Court for the District of Columbia. See Sherman College of Straight Chiropractic v. United States Commissioner of Education, 493 F.Supp.

976 (D.D.C. 1980). CCE was also approved as an accrediting agency by the Council on Post Secondary Accreditation ("COPA") in 1976. COPA is a private, nonprofit association of accrediting agencies and national higher educational associations, which endeavors to promote quality in the accreditation process by reviewing and approving accrediting agencies. COPA renewed CCE's approval in 1982.

3 Despite its rejection by CCE, Sherman is clearly a substantial educational institution, dedicated to giving its students a quality chiropractic education within the parameters of its chiropractic philosophy. The court also found Sherman's founder and president, Dr. Thomas A. Gelardi, to be a person of high intelligence and integrity.

Sherman College has been fully accredited by the Southern Association of Colleges and Schools, a regional accrediting agency, since December of 1984. Sherman also has candidate status with Plaintiff SCASA, the Straight Chiropractic Academic Standards Association, Inc. Although accreditation with these organizations increases the prestige of Sherman's graduates to become licensed chiropractors because of the regulatory choices made by the state licensing boards. (See discussion in text at pp. 4-5, infra).

SCASA is an accrediting agency formed in 1978, with Sherman College and Pennsylvania College of Straight

Chiropractic (formerly Adio Institute) as founding members. SCASA has not made application to the USOE or to COPA for recognition.

SCASA has sought recognition as an accrediting agency for chiropractic colleges from a number of states. It has received recognition as of today only from the District of Columbia. CCE testified against SCASA at several state hearings on approval of SCASA, including New Hampshire, South Carolina and the District of Columbia.

Both USOE and COPA will entertain applications from more than one accrediting agency in a particular professional field. COPA currently recognizes two accrediting agencies in legal education, as well as two accrediting agencies in the field of medical assistance and medical technology. The evidence indicated that dual recognition for both CCE and SCASA would be unlikely but it is possible.

4 Plaintiffs contend FCLB conspired with Defendants but FCLB is not a Defendant in this action.

5 For example, Dr. Vern R. Webster was vice president of the FCLB from 1972 through 1977, and president from 1977 through 1979. He was also a director of the NBCE from 1975 through 1979, and has occupied that position sine 1981 as well. Furthermore, Dr. Webster was a member of the Commission on Accreditation of the CCE from approximately December of 1978

through February of 1981.

Dr. James A. Mertz served as vice president of the FCLB from 1974 to 1975, and as president from 1975 through 1976. Dr. Mertz was vice president of the CCE in 1976, and president in 1977 and 1978. He also served as a member of the Commission on Accreditation of the CCE from July of 1974 through December of 1982, serving as chairman of the Commission the last two years. While president of the FCLB, Dr. Mertz also served as a director on the NBCE.

6 NBCE points out that this request was initiated by the members of certain state chiropractic licensing boards. They threatened to stop using the NBCE exam for licensure purposes unless graduates of anti-diagnostic schools were denied permission to take the exam. This fact is evidence which shows that at least some chiropractic licensing boards were actively involved in assisting the pro-diagnostic group.

7 The parties did not address the issue of whether the administration of general diagnostic tests by chiropractors would or does violate scope-of-practice limitations in the various states.

8 Sherman College is presently one of two anti-diagnostic chiropractic colleges in the United States.

9 The Ninth Circuit later declined to follow Harman in Sun Valley Disposal Co. v. Silver State Disposal Co., 420

F.2d 341, 342 (9th Cir. 1969). See also Metro Cable Co. v. CATV of Rockford, Inc., 516 F.2d 220, 229-30 (7th Cir. 1975).

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

SHERMAN COLLEGE OF STRAIGHT CHIROPRACTIC, STRAIGHT CHIROPRACTIC ACADEMIC STANDARDS ASSOCIATION, INC., WILLIAM SUKOVITCH and MICHAEL KUDLAS	)	
vs.	)	CIVIL NO. C81-1767
AMERICAN CHIROPRACTIC ASSOCIATION, INC., THE COUNCIL ON CHIROPRACTIC EDUCATION, INC., NATIONAL BOARD OF CHIROPRACTIC EXAMINERS, and SID E. WILLIAMS	)	

ORDER

This antitrust action was tried without a jury in March of 1985. On March 26, 1985, the court granted the motion of Defendant American Chiropractic Associatin, Inc. ("ACA") to dismiss under Fed.R.Civ.P. 41(b), finding that upon the facts and the law Plaintiffs had shown no right to relief. This order shall constitute the written findings required

by Rule 41(b).

For the general background of this case, the court adopts the findings of fact set forth in the court's order entered January 9, 1986. in which the court found in favor of Defendants The Council on Chiropractic Education and National Board of Chiropractic Examiners. As to the ACA, the court finds that Plaintiffs failed to present sufficient evidence to give rise to an inference of anti-competitive intent on ACA's part. The court finds that a more appropriate inference from the evidence presented is that ACA, acting as a trade association for the chiropractic profession, undertook activities to further the perceived best interests of the profession and its members.

Furthermore, the court adopts for

the purposes of this order the conclusions of law set forth in the court's January 9, 1986 order. Plaintiffs failed to prove that ACA's activities diminished competition in a relevant chiropractic market, which is an essential component of their antitrust claim under a rule of reason analysis. Order of January 9, pp. 8-13. ACA's activities in persuading the state boards of chiropractic to exclude gradutes of anti-diagnostic institutions from becoming licensed chiropractors are also immunized from antitrust liability under the Noerr-Pennington doctrine. Order of January 9, pp. 13-28.

The court therefore DIRECTS that the judgment be entered in favor of Defendant American Chiropractic Association, Inc.

SO ORDERED, this 16th day of

January, 1986.

ORINDA D. EVANS
UNITED STATES
DISTRICT COURTHOUSE

JUDGMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

DOCKET NO. C81-1767A
NAME OF JUDGE OR MAGISTRATE
HONORABLE ORINDA D. EVANS

CASE TITLE: SHERMAN COLLEGE OF STRAIGHT CHIROPRACTIC, STRAIGHT CHIROPRACTIC ACADEMIC STANDARDS ASSOCIATION, INC.,WILLIAM SUKOVITCH, MICHAEL J. KUDLAS

v.

AMERICAN CHIROPRACTIC ASSOCIATION, INC., THE COUNCIL ON CHIROPRACTIC EDUCATION INC., NATIONAL BOARD OF CHIROPRACTIC EXAMINERS & SID E. WILLIAMS

Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERD AND ADJUDGED

That the plaintiffs, SHERMAN COLLEGE OF STRAIGHT CHIROPRACTIC, STRAIGHT CHIROPRACTIC ACADEMIC STANDARDS

ASSOCIATION, INC. WILLIAM SUKOVITCH, MICHAEL J. KUDLAS, take nothing, that the action be dismissed and that defendants, AMERICAN CHIROPRACTIC ASSOCIATION, INC., THE COUNCIL ON CHIROPRACTIC EDUCATION, INC., NATIONAL BOARD OF CHIROPRACTIC EXAMINERS & SID E. WILLIAMS, RECOVER from the plaintiffs ther costs of action.*****

FILED AND ENTERED
IN CLERK'S OFFICE
JANUARY 9, 1986
LUTHER D. THOMAS, Clerk

By: Diane Gaylor
Deputy Clerk

Clerk	Date
Luther D. Thomas	Jan. 9, 1986

(By) Deputy Clerk
Diane Gaylor

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 86-8226

D.C. Docket No. 81-1767

SHERMAN COLLEGE OF STRAIGHT CHIROPRACTIC; STRAIGHT CHIROPRACTIC ACADEMIC STANDARDS ASSOCIATION, INC., a Pennsylvania Corporation,

Plaintiffs-Appellants,

versus

AMERICAN CHIROPRACTIC ASSOCIATION, INC., THE COUNCIL ON CHIROPRACTIC EDUCATION, INC., NATIONAL BOARD OF CHIROPRACTIC EXAMINERS, and SID E. WILLIAMS,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia

---

Before TJOFLAT and HILL, Circuit Judges, and LYNNE*, Senior District Judge.

JUDGMENT

This cause came on to be heard on

the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, AFFIRMED;

It is further ordered that plaintiffs-appellants pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

---

*Honorable Seybourn H. Lynne, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

Clerk, U.S. Court of Appeals

Eleventh Circuit

By: Pam Holloway
Dupty Clerk
Atlanta, Georgia

ISSUED AS MANDATE: JUNE 22, 1987

Entered: March 27, 1987
For the Court: Miguel J. Cortez, Clerk

By: Jean Leonard
Dupty Clerk

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 86-8226

SHERMAN COLLEGE OF STRAIGHT CHIROPRACTIC; STRAIGHT CHIROPRACTIC ACADEMIC STANDARDS ASSOCIATION, INC., a Pennsylvania Corporation,

Plaintiffs-Appellants,

versus

AMERICAN CHIROPRACTIC ASSOCIATION, INC., THE COUNCIL ON CHIROPRACTIC EDUCATION, INC., NATIONAL BOARD OF CHIROPRACTIC EXAMINERS, and SID E. WILLIAMS,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia

---

ON PETITION(S) FOR REHEARING
(May 8, 1987)

BEFORE: TJOFLAT and HILL, Circuit Judges, and Lynne* Senior District Judge.
PER CURIAM:

The petition(s) for rehearing filed by Sherman College of Straight Chiropractic, et. al., is denied.

ENTERED FOR THE COURT:

_____
United States Circuit Judge

_____
*Honorable Seybourn H. Lynne, Senior, U.s. District Judge for the Northern District of Alabama, sitting by designation. REHG-4/(Rev. 9/85)

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 86-8226

SHERMAN COLLEGE OF STRAIGHT CHIROPRACTIC; STRAIGHT CHIROPRACTIC ACADEMIC STANDARDS ASSOCIATION, INC., a Pennsylvania Corporation,

Plaintiffs-Appellants,

versus

AMERICAN CHIROPRACTIC ASSOCIATION, INC., THE COUNCIL ON CHIROPRACTIC EDUCATION, INC., NATIONAL BOARD OF CHIROPRACTIC EXAMINERS, and SID E. WILLIAMS,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia

---

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion March 27, 11 Cir. 1987, ___F.2d___).

(May 18, 1987)

BEFORE: TJOFLAT and HILL, Circuit Judges, and Lynne* Senior District Judge.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is Denied.

ENTERED FOR THE COURT:

James C. Hill
United States Circuit Judge

*Honorable Seybourn H. Lynne, Senior, U.S. District Judge for the Northern District of Alabama, sitting by designation. REHG-6 (Rev. 6/82)

Supreme Court, U.S.
FILED
SEP 2 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-209

In The
Supreme Court of the United States
October Term, 1987

SHERMAN COLLEGE OF STRAIGHT CHIROPRACTIC AND STRAIGHT CHIROPRACTIC ACADEMIC STANDARDS ASSOCIATION, INC.,

Petitioners,

v.

AMERICAN CHIROPRACTIC ASSOCIATION, INC., THE COUNCIL ON CHIROPRACTIC EDUCATION, INC., NATIONAL BOARD OF CHIROPRACTIC EXAMINERS AND SID E. WILLIAMS,

Respondents.

SID E. WILLIAMS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Did the courts below correctly hold that Petitioners failed to carry their burden of proof that the conduct of this and the other respondents had an anti-competitive effect in any relevant market?

2. Did the courts below correctly hold that the *Noerr-Pennington* doctrine exempted from antitrust liability the Respondents' petitioning activities before various state and federal agencies?

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No. 87-209

In The

Supreme Court of the United States

October Term, 1987

SHERMAN COLLEGE OF STRAIGHT CHIROPRACTIC AND STRAIGHT CHIROPRACTIC ACADEMIC STANDARDS ASSOCIATION, INC.,

Petitioners,

v.

AMERICAN CHIROPRACTIC ASSOCIATION, INC., THE COUNCIL ON CHIROPRACTIC EDUCATION, INC., NATIONAL BOARD OF CHIROPRACTIC EXAMINERS AND SID E. WILLIAMS,

Respondents.

SID E. WILLIAMS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

STATEMENT OF CASE

Respondent Sid E. Williams ("Dr. Williams") concurs with the comments and restatement of the facts of this case as set out in the briefs in opposition to the Petition for Certiorari filed by the Council on Chiropractic

Education ("CCE"), the National Board of Chiropractic Examiners ("NBCE") and the American Chiropractic Association, Inc. ("ACA"). Additionally, there are a few relevant facts peculiar to Dr. Williams which have not been adequately briefed.

Dr. Williams is the only individual Respondent in this case. He is the President of Life Chiropractic College, Inc. located in Marietta, Georgia. He does not compete with any of the other Respondents nor in his individual capacity does he compete with any of the Petitioners.

Consistent with the comments made by the CCE and ACA in their briefs, Dr. Williams is a "straight" chiropractor as that term is traditionally defined. In other words, Dr. Williams believes a chiropractor should use only spinal adjustment in the care of his patients where as other chiropractors, traditionally called "mixers", use adjunctive therapies or modalities in the care of patients in addition to spinal adjustments. The Petitioners represent still a third philosophy within the chiropractic profession which the Trial Court correctly defined as "anti-diagnostic." The Petitioners do not believe a chiropractor should receive clinical training in diagnostic procedures whereas students who attend colleges accredited by the CCE receive clinical diagnostic training.

The Petitioners attach to their Petition for Certiorari the order entered by the Trial Court granting judgment in favor of the CCE and the NBCE and the order granting judgment to the ACA. The Petitioners failed to inform this Court that an additional order was entered immediately upon the conclusion of the trial setting out find-

ings and fact and conclusions of law as to Dr. Williams. A copy of this order is attached as an Appendix to this brief. The trial court simply held with regard to Dr. Williams that the Petitioners "failed to carry their burden of proof with respect to any allegation against Dr. Williams for damages or injunctive relief under the Sherman Antitrust Act. . . ."

The Trial Court concluded as a matter of fact that the only credible evidence contained in the record with respect to Dr. Williams to allow an inference that he was part of any conspiracy consisted of the transcript of testimony he gave before a Commission of the United States Office of Education in 1979 and testimony of a Dr. Ronald Hash before the New Hampshire Board of Chiropractic Examiners in 1983. While the Trial Court found that the testimony of Dr. Williams was protected under the *Noerr-Pennington* doctrine it further concluded that even if there were no *Noerr-Pennington* protection, the Petitioners had simply failed to carry their burden of proof.

———o———

SUMMARY OF ARGUMENT

It is the position of Dr. Williams that this case presents no novel or complex issue for this court to decide. With respect to Dr. Williams, it is a case where the petitioners failed to prove the facts necessary to carry their burden of proof and where the lobbying activity of Dr. Williams was protected from antitrust restrictions by the *Noerr-Pennington* doctrine.

———o———

ARGUMENT

I. Did the courts below correctly hold that Petitioners failed to carry their burden of proof that the conduct of this and other Respondents had an anticompetitive effect in any revelvant market?

So as to avoid repetitious argument, Dr. Williams adopts and includes in his argument the briefs filed by the CCE, NBCE and ACA.

Dr. Williams was granted judgment in his favor by the Trial Court in Findings and Facts and Conclusions of law which were filed with the clerk on April 17, 1986 (see annex). Nowhere in Petitioners' brief do they argue that these findings of fact are clearly erroneous. In fact, nowhere in Petitioners' brief before this Court or before the Court of Appeals are these findings or Facts and Conclusions of law discussed.

When considered as part of the record, the Trial Courts' order concerning Dr. Williams takes this case out of any category which should be reviewed by this Court, at least with respect to Dr. Williams. The findings of the Trial Court on matters of fact are sacrosanct unless a clear error has been made. *Dothan Coca Cola Bottling Co. v. United States*, 745 F.2d 1400 (5th Cir. 1984). A factual finding is "clearly erroneous" if "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Id* at 1404-05. (Citing *United States v. U.S. Gypsum Co.*, 333 U.S. 364 (1948)). The clearly erroneous test is equally applicable to an antitrust action. *See United States v.*

Yellow Cab Co., 338 U.S. 338 (1949). Petitioners do not argue that any of the Trial Court's findings are clearly erroneous thus giving this Court no basis to review the factual basis of the decisions below.

The judgment in favor of Dr. Williams does not rely upon the intricacies of antitrust law. Instead, it is simply a question of whether the plaintiffs proved their case. The Trial Court concluded they did not and that should end the necessity of reviewing irrelevant legal questions.

II. Did the Courts below correctly hold that the Noerr-Pennington doctrine exempted from antitrust liability the Respondents' petitioning activities before various state and federal agencies?

The Trial Court found that the only credible evidence contained in the entire record regarding Dr. Williams' alleged liability consisted of petitioning activity of Dr. Williams and one of his associates before the United States Office of Education and the New Hampshire Board of Chiropractic Examiners. The Trial Court held that Dr. Williams' testimony clearly was protected activity pursuant to the *Noerr-Pennington* doctrine. *See generally, United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Eastern Railroad President's Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). The Court further concluded that even if it were not protected the evidence did not preponderate in favor of petitioners.

The activity of Dr. Williams in presenting his views to governmental bodies is classic protected petitioning activity. There is nothing in the activity of Dr. Williams which creates a novel situation. In any event, Dr. Wil-

liams concurs and adopts the arguments of the other Respondents regarding *Noerr-Pennington.*

———o———

CONCLUSION

Thus, with respect to Dr. Williams, this case presents no novel issues that require review by this court. The Court of Appeals, having thoroughly reviewed the record and after listening to oral argument, affirmed the decision of the Trial Court without additional opinion. It obviously concluded that no significant issues were presented which required lengthy discussion. Dr. Williams respectfully requests this Court to deny the Petition for Certiorari.

Respectfully submitted,

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APPENDIX A

ORIGINAL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

SHERMAN COLLEGE OF STRAIGHT CHIROPRACTIC, INC., et al.,	)	
Plaintiffs,	)	
vs.	)	Civil Action, File No. C81-1767A
AMERICAN CHIROPRACTIC ASSOCIATION, INC., et al.,	)	
Defendants.	)	

FINDINGS OF FACT AND
CONCLUSIONS OF LAW AS TO DEFENDANT
SID E. WILLIAMS

(Filed April 17, 1985)

This case having come on regularly for trial before the Court, sitting without a jury, on March 11, 1985, and the Court having considered the evidence presented, the Court hereby makes the following Findings of Fact and Conclusions of Law with respect to Defendant Sid E. Williams ("Dr. Williams") and enters its Order as follows:

1.

Plaintiffs alleged that Dr. Williams combined and conspired with Defendants American Chiropractic Association, Council on Chiropractic Education and the National Board of Chiropractic Examiners (hereinafter re-

ferred to as "the other Defendants") and other parties not before the Court unreasonably to restrain competition and unreasonably to interfere with Plaintiffs' ability to function and compete in the chiropractic profession in violation of § 1 of the Sherman Antitrust Act, 15 U.S.C. § 1.

2.

Plaintiffs alleged that Dr. Williams attempted to monopolize, combined and conspired with the other Defendants and other parties not before the Court to monopolize the chiropractic profession, including but not limited to accreditation of chiropractic colleges, the testing of applicants for licensure, chiropractic education, entry into the profession and the practice of chiropractic in the United States, in violation of § 2 of the Sherman Antitrust Act, 15 U.S.C. § 2.

3.

Plaintiffs alleged they suffered injury and damages as a result of the alleged activities of Dr. Williams.

4.

Dr. Williams is President of Life Chiropractic College, a nonprofit, tax exempt professional school which has recognized candidate for accreditation status with the Council on Chiropractic Education.

5.

The Court finds the only credible evidence contained in the record sufficient to allow an inference that Dr. Williams was a part of the conspiracy as alleged or suffi-

cient to allow an inference Dr. Williams allegedly violated the antitrust laws, was his testimony before a Commission of the United States Office of Education in 1979 and the testimony of Dr. Ronald Hash, a representative of Life Chiropractic College, before the New Hampshire Board of Chiropractic Examiners in 1983.

6.

The Court finds that the testimony of Dr. Williams before a Commission of the United States Office of Education was protected activity under the Noerr-Pennington Doctrine. *See generally, United Mine Workers v. Pennington,* 381 U.S. 657 (1965); *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961).

7.

The Court does not reach a decision as to whether the testimony of Dr. Hash was protected activity under the Noerr-Pennington Doctrine.

8.

The Court finds that even if the testimony of Dr. Williams or Dr. Hash were not protected activities under the Noerr-Pennington Doctrine, and assuming that Dr. Hash's testimony is attributable to Dr. Williams, the total evidence against Dr. Williams is insufficient to supply a preponderance of the evidence with respect to his involvement in any claimed conspiracy or violation of the federal antitrust laws.

9.

The Court finds the Plaintiffs have failed to carry their burden of proof with respect to any allegation against Dr. Williams for damages or injunctive relief under the Sherman Antitrust Act, 15 U.S.C. § 1, *et seq.*

WHEREFORE, IT IS ORDERED AND ADJUDGED that judgment be entered in favor of Defendant Sid E. Williams and against the Plaintiffs Sherman College of Straight Chiropractic, Inc., Straight Chiropractic Academic Standards Association, Inc., William Sukovitch and Michael J. Kudlas with costs cast upon the Plaintiffs.

SO ORDERED, this 16 day of April, 1985.

/s/ Orinda D. Evans
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
SEP 3 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-209

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

SHERMAN COLLEGE OF STRAIGHT CHIROPRACTIC, *et al.*,
Petitioners,

v.

AMERICAN CHIROPRACTIC ASSOCIATION, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION FOR RESPONDENT THE COUNCIL ON CHIROPRACTIC EDUCATION, INC.

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QUESTIONS PRESENTED

Petitioners' statement of the questions presented materially distorts the District Court's decision in order to find questions worthy of this Court's review. This case presents none of the questions that petitioners claim it presents.

The questions actually presented are:

1. Whether the District Court and the unanimous Court of Appeals below correctly held that the *Noerr-Pennington* doctrine exempted from antitrust liability respondents' petitioning activities that persuaded various state governmental authorities to adopt stricter licensure requirements for the protection of the public against inadequately trained chiropractors.

2. Whether the District Court and Court of Appeals correctly held that petitioners had failed to show respondents' activities had had any anticompetitive effect in any relevant market, and that this failure of proof doomed their antitrust claims.

PARTIES TO THE PROCEEDING AND RULE 28.1 LIST

The petition's caption contains the names of all parties to the proceeding in the Court of Appeals below, the court whose judgment is sought to be reviewed.

As required by Rule 28.1, respondent The Council on Chiropractic Education, Inc., a Wisconsin not-for-profit corporation, states that it has no parent, subsidiary, or affiliated companies.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-209

SHERMAN COLLEGE OF STRAIGHT CHIROPRACTIC, *et al.*,
Petitioners,

v.

AMERICAN CHIROPRACTIC ASSOCIATION, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF IN OPPOSITION FOR RESPONDENT THE COUNCIL ON CHIROPRACTIC EDUCATION, INC.

Petitioners sought to impose treble-damage antitrust liability on respondents solely because the vast majority of state licensing authorities agreed with respondents that doctors of chiropractic should be adequately trained in diagnosis in order to be licensed to practice their profession. Both the District Court and the Court of Appeals found as a fact that respondents had engaged in no anticompetitive conduct or conspiracy, and that their lawful petitioning activities aimed at establishing licensure requirements that would protect the public

against inadequately trained chiropractors were protected by the *Noerr-Pennington* doctrine. The courts' findings were fully supported by the evidence, and their legal conclusions were entirely consistent with established law. This case thus presents no question warranting review by this Court.

COUNTERSTATEMENT OF THE CASE

Petitioners' Statement of the Case contains numerous mischaracterizations of the proceedings, record, and judgment below. We will not burden this Court with a detailed rebuttal of these distortions, but instead respectfully invite the Court's attention to the District Court's statement of facts in its opinion below (Pet., pp. 4a-16a), which adequately states the facts material to this Court's consideration of the questions presented.[1] We highlight only the following additional points.

Respondent The Council on Chiropractic Education, Inc. ("CCE") was incorporated in 1971 as an autonomous national accrediting agency for chiropractic education. Its members include 15 of the 17 chiropractic colleges in the United States; only petitioner Sherman College of Straight Chiropractic ("Sherman College") and another antidiagnostic college that has never sought CCE membership are not members. Since 1974 CCE has been recognized as a nationally recognized accrediting agency by the U.S. Office of Education ("USOE") and by its successor the U.S. Department of Education.

CCE's purpose is to establish and promote high standards of quality in chiropractic education. CCE establishes accrediting standards or requirements (called "Educational Standards for Chiropractic Colleges") that

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[1] The District Court based its findings on the record developed at a 10-day trial that involved the testimony of 15 witnesses (live or by deposition) and hundreds of documentary exhibits. After hearing oral argument, the Court of Appeals unanimously affirmed the District Court's decision in a *per curiam* opinion.

colleges must meet in order to be eligible for CCE accreditation. These minimum standards relate to the college's curriculum, faculty, library, physical facilities, laboratories, instructional aids and equipment, and a host of other areas that bear on the quality of the professional educational program offered by the college. CCE's Commission on Accreditation, an independent unit within CCE, applies CCE's standards to those chiropractic colleges that ask to be evaluated by it.

Since at least 1964, the accreditation standards of CCE and its predecessor organization have included the requirement of adequate diagnostic training. Petitioners repeat in this Court their outrageous charge that CCE's standards regarding diagnosis were "financially, not educationally, motivated" in order to allow practitioners to "perform more patient services and therefore increase revenue." (Pet., p. 14.) There is no evidence whatsoever to support this charge. Instead, the evidence establishes that the purpose of the requirement is to protect the public from the health risks posed by the practice of chiropractic by practitioners with inadequate diagnostic skills. These risks arise because there are numerous serious or life-threatening conditions (such as various aggressive forms of cancer) that produce symptoms similar to the symptoms of spinal misalignment. If a chiropractor commences chiropractic treatment without performing diagnostic tests sufficient to detect these abnormalities and thus fails to refer the patient for prompt medical treatment, the patient's condition may deteriorate because of the delay in getting appropriate treatment.

CCE is representative of a broad spectrum of the chiropractic profession. CCE does not represent only the so-called "mixer" segment of the profession, nor does it exclude or oppose the so-called "straight" segment,[2] as

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[2] Contrary to petitioners' misleading terminology, the controversy between the antidiagnostic viewpoint and the mainstream diag-

those terms are generally understood. It excludes from accreditation status only those institutions that do not measure up to its minimum standards in any respect, including the requirement of adequate diagnostic training.

CCE accreditation is entirely voluntary, and not a prerequisite for the organization or operation of a chiropractic college. The accrediting activities of agencies such as CCE help prospective students by identifying those educational institutions whose programs have been assessed and found to be directed toward the preparation of competent professionals and by facilitating transfers among various professional schools. They also help the general public choose among practitioners by identifying those programs that are judged to be effective in the preparation of professionals who are adequately trained for practice in the profession. Accreditation is particularly important in the health care professions, because proper training of health care professionals is vital to public health, safety, and welfare.

In 1974, CCE urged the Federation of Chiropractic Licensing Boards ("FCLB") (a non-profit corporation whose members include chiropractic licensing boards of

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nostic viewpoint is not a controversy between "straight" and "mixer" views of chiropractic, because the "straight" vs. "mixer" controversy concerns the scope of treatment, not the role of diagnosis. It is only petitioners and their antidiagnostic adherents (aptly termed a "deviant splinter group" in *Sherman College v. United States Commissioner of Education*, 493 F. Supp. 976, 981 (D.D.C. 1980)) who define "straight" chiropractic to include antidiagnostic chiropractic and nothing else. The best evidence that traditional "straight" chiropractic is not antidiagnostic is that the accrediting standards of the accrediting agency sponsored by the International Chiropractors Association, the largest organization of straight chiropractors, were virtually identical to CCE's standards regarding diagnosis. The District Court correctly found that the dispute between petitioners and the mainstream of the profession concerned diagnosis and diagnostic training. (Pet., pp. 4a-6a.)

the various states and the individual members of such boards) to adopt a resolution urging various state licensing boards to require that all applicants for licensure after a certain date have graduated either from a chiropractic college having status with CCE's Commission on Accreditation or from a college meeting equivalent standards. CCE urged various state board members to contact the attorneys general of their respective states for advice on proper implementation of the FCLB resolution.

In urging this public policy upon the various state chiropractic licensing boards, CCE had no purpose whatsoever to restrain or injure Sherman College or any antidiagnostic college. Every chiropractic college in the United States at that time (including petitioner Sherman College) either had status with CCE, had an application pending for status, or had submitted a letter of intent to apply for status. Sherman College itself was proclaiming to CCE as late as 1976 its commitment to the CCE standards concerning diagnosis, and even stated in its own catalogue that it was complying with all of CCE's accreditation requirements and expected to be accredited by CCE within the minimum allowable time.

In October 1976, Sherman College apparently changed its mind about diagnosis. It withdrew its letter of intent to seek status with CCE and began a campaign to persuade individual state licensing boards to permit its graduates to become licensed, notwithstanding its lack of status with CCE. These efforts set the stage for a vigorous public policy debate in a number of states and before the USOE concerning whether adequate diagnostic training should be required as a condition of chiropractic licensure. Petitioners' sole complaint in this Court, as below, is that in most of the states they lost this debate. Respondents did no more than engage in proper petitioning activities genuinely designed to achieve the public policy results that respondents were urging: restriction of licensure to persons with adequate diagnostic training,

or, in the case of USOE, its continued recognition of CCE.

Petitioners' lengthy catalogue (Pet., pp. 9-17) of alleged wrongs purportedly committed by various respondents during the course of this public policy dispute need not be considered. The District Court correctly found that the only actions of respondents that had an adverse impact on petitioners were the respondents' successful petitioning of state governmental officials and bodies to restrict licensure to persons with adequate diagnostic training. (Pet., p. 31a.) At the trial below, petitioner Sherman College based its entire damage claim on its graduates' inability to become licensed in more than twelve states because of state licensing boards' policy decisions. The District Court's finding in this regard was unchallenged by the College in the court below.

REASONS FOR DENYING THE WRIT

This case presents none of the questions that petitioners have alleged. Petitioners' tactical ploy, both in this Court and below, has been to ignore the findings of fact actually made by the District Court (and affirmed by the Court of Appeals), and to assume instead that the District Court had resolved all disputed issues of fact in their favor. Petitioners then attack as error the lower courts' refusal to apply settled legal principles to facts that the District Court never found.

Petitioners contend that the District Court found that respondents were dominant horizontal competitors that had been engaged in an explicit group boycott, a concerted refusal to deal with petitioners that was intended to exclude them as competitors. Thus, the petition bristles with references to respondents' "explicit combination to eliminate the petitioners from the profession of chiropractic education and limit consumer choice regarding available services" (Pet., p. i), to a "horizontal agreement among dominant competitors to exclude other

competitors from the market through predatory conduct" (*id.* at ii), to "a private conspiracy among professionals to eliminate competition with respect to services provided to consumers, precluding consumer choice with respect to alternative services" (*id.*), and to an "intentional agreement not to offer, or allow others to offer, 'straight' chiropractic to consumers" (*id.* at 34). Petitioners' constant refrain is the alleged "boycott" of "colleges like Sherman." (*See, e.g., id.* at 21, 23, 24.) Petitioners also claim that the District Court's decision "expressly states that defendants [respondents] had both market dominance and control of essential elements—national testing and accreditation." (*Id.* at 26.)

Petitioners next contend that the District Court excused respondents' purportedly clear-cut antitrust violations because it erroneously concluded that petitioners had failed to prove the requisite anticompetitive effect. Petitioners claim that the District Court reached this erroneous conclusion for two reasons: first, because "although petitioners would be eliminated from the market, the conspirators . . . would continue to compete among themselves" (*id.* at i; *see also id.* at 24), and, second, because there had been an increase (*id.* at 31-32) or at least no decrease (*id.* at 34) in the number of competitors. Finally, petitioners argue that the District Court compounded its error by extending *Noerr-Pennington* protection to CCE's allegedly "exclusionary accreditation standards" (*id.* at 35) purportedly because "state boards or legislatures subsequently refer[red] to the conspirators' private standard setting organization in rules or statutes." (*Id.* at iii.)

Petitioners' argument misstates and distorts every significant holding of the District Court. As a result, the questions that petitioners claim this case presents are abstract, hypothetical questions that lack the slightest connection with the reality of the decision and record below.

I. The District Court Found No Group Boycott or Horizontal Concerted Refusal To Deal.

The District Court never found that respondents had engaged in a group boycott or a horizontal concerted refusal to deal, or any explicit combination to eliminate competition. The court's other findings preclude such a finding, because none of the respondents competes with any other respondent in any market. There is no market in which an accrediting agency for chiropractic colleges (CCE), a national professional association of chiropractors (ACA), a national testing agency for the chiropractic profession (NBCE), and the president of a chiropractic college (Dr. Williams) compete with each other. For this reason, respondents could not have engaged in a horizontal group boycott or concerted refusal to deal, and the District Court made no such finding.

The District Court found instead that respondents had similar views on the importance of adequate diagnostic training as a prerequisite for licensure to practice chiropractic, and communicated these views to state governmental officials by means of petitioning activities that never went "beyond petitioning through appropriate channels." (Pet., p. 54a.) State legislatures and licensing authorities responded by adopting statutes or regulations that required adequate diagnostic training and denied licensure to applicants—from Sherman College or elsewhere—who lacked such training. Thus, the only "boycott" involved in this case was no boycott at all, but merely the refusal of some 39 state licensing bodies, in the exercise of their regulatory authority, to license graduates of Sherman College. The courts below correctly held that the *Noerr-Pennington* doctrine protected respondents from antitrust liability for such governmental action. (*See* pp. 12-14 below.)

Petitioners contend that CCE's "exclusionary" standards in and of themselves were the hallmark of the alleged group boycott. This is a perversion of the term

"boycott." It is an essential part of the purpose and operation of every accrediting agency or other standard-setting organization to adopt reasonable standards and to refuse to certify that a college (or product or service) meets the agency's standards when it has failed them. In this sense (and only this sense) CCE's accreditation standards and the standards of other standard-setting organizations are necessarily "exclusionary" because all standards necessarily exclude those colleges, products, or services that fail to measure up.

Petitioners' contend that CCE's adoption and application of its standards constituted an unlawful horizontal boycott simply because Sherman College failed or refused to meet the CCE standards. This claim runs squarely contrary to established authority. *See, e.g., Eliason Corp. v. National Sanitation Foundation*, 614 F.2d 126 (6th Cir.), *cert. denied*, 449 U.S. 826 (1980) (rejecting claim that standard-setting organization's denial of seal of approval to product that failed to meet its standards constituted group boycott). The record below established that CCE's standards were not unreasonably exclusionary but were reasonably related to the promotion of educational quality and to the protection of the public. (R19-984-91.) If petitioners' theory were correct, and a plaintiff could recover antitrust treble damages merely by showing that an accrediting agency or other standard-setting organization had decided that the plaintiff had not measured up to its standards, private accreditation and other beneficial standard-setting activities would be eliminated. Nothing in antitrust jurisprudence requires wholesale condemnation of such long established, widespread, and valuable pro-competitive activities.[3]

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[3] Petitioners' related claim that the District Court found that respondents possessed "market dominance" (Pet., pp. 20, 26) rests upon a transparent distortion of the record. The District Court found that the "*pro-diagnostic* forces have achieved dominance in the profession." (*Id.* at 6a; emphasis added.) Because this finding is the next sentence after the District Court's discussion of the

II. The District Court Correctly Found That Petitioners Had Failed To Show an Anticompetitive Effect in Any Relevant Market.

The District Court below found as a fact that petitioners had failed to show that respondents' activities had had an unreasonable anticompetitive effect in any relevant market. Because, as petitioners appear to concede, the *per se* rule is inapplicable to this case,[4] the District Court's well-supported finding of fact dooms petitioners' antitrust claims. Petitioners' failure to prove an anticompetitive effect required rejection of their antitrust claims, because it is well settled, as the District Court recognized (Pet., pp. 18a-19a), that the Sherman Act, 15 U.S.C. § 1, "was intended to prohibit only unreasonable restraints of trade," *NCAA v. Board of Regents*, 468 U.S. 85, 98 & n.17 (1984), citing *National Society of Professional Engineers v. United States*, 435 U.S. 679, 687-89, 691 (1978) (Rule of Reason inquiry

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philosophical differences between petitioners and respondents, it is clear from the context that the court was referring to the dominance of the pro-diagnostic philosophy in the profession. Petitioners then tamper with the court's finding by substituting "[defendants]" for the court's words "the pro-diagnostic forces" to make it seem that the court had found that respondents had market dominance. The court made no such finding, however.

[4] Although petitioners' contentions on this point are far from clear (*see* Pet., pp. 24-26), it appears that they have abandoned in this Court their claim below that respondents' activities were illegal *per se* and that as a result they were not required to show an actual anticompetitive effect in a relevant market. In any event, such a claim is foreclosed by this Court's recent decision in *FTC v. Indiana Federation of Dentists*, 106 S. Ct. 2009 (1986), upon which petitioners heavily rely. This Court's rejection of the *per se* rule in that case, which involved a direct horizontal agreement among competing members of the dental profession that resembled a group boycott, requires rejection of the rule in this case, which has no horizontal agreement or boycott whatsoever. Each of the factors relied upon by this Court in rejecting the application of the *per se* rule in *Indiana Federation of Dentists*, 106 S. Ct. at 2017-18, applies with equal or greater force here.

concerns "whether the challenged agreement is one that promotes competition or one that suppresses competition").

Petitioners again distort the District Court's decision in their attack on the court's explicit finding that they had failed to prove an unreasonable anticompetitive effect in any relevant market. They claim that the court below so held merely because pro-diagnostic chiropractors and chiropractic colleges continued to compete among themselves. This was not the basis of the District Court's finding, however.

Although petitioners failed at trial to define what relevant markets had allegedly been restrained (Pet., pp. 16a-17a), the District Court analyzed the effects of respondents' alleged anticompetitive activities in two separate markets: chiropractic education and chiropractic health care services. (*Id.*)

With respect to the chiropractic education market, the District Court correctly held that petitioners had presented no evidence of diminished competition in that market. (*Id.* at 18a.) This finding immediately followed a paragraph in which the court pointed out that there were both antidiagnostic and prodiagnostic chiropractic colleges which, the court assumed, competed with each other in order to attract and hold tuition-paying students. (*Id.*) The court correctly held that there was no evidence of diminished competition, either among chiropractic colleges generally or between the pro- and anti-diagnostic groups. Students were and are perfectly free to choose whether they wished to attend an antidiagnostic college or a diagnostic college, knowing that if they chose the latter they would have to take additional courses in diagnosis. Sherman College's lagging enrollment compared to increasing enrollments at diagnostic colleges hardly establishes a diminution of competition but is instead evidence of competition at work.

It is not surprising that students choose mainstream diagnostic colleges rather than antidiagnostic colleges.

The District Court also found "that the evidence does not preponderate in favor of a finding of unreasonable anti-competitive effect" in the chiropractic services market. (Pet., p. 25a.) The basis for the Court's holding in this regard had nothing to do with the continuation of competition among the alleged conspirators. The District Court's explanation set forth immediately after this finding focused on the impact on the consuming, patient public of CCE's increased educational requirements and correctly found a complete absence of evidence that CCE's standards had coerced patients into purchasing unwanted diagnostic services or had increased the cost of chiropractic services to patients. (*Id.* at 25a-26a.) The Court noted that there was also no evidence that chiropractors who believed in diagnosis had sufficient power in the patient market to coerce the purchase of unwanted diagnostic services or to increase prices. (*Id.*)

The District Court's findings are clearly correct and were unanimously affirmed by the Court of Appeals below. Under this Court's "two-court" rule, the Court " 'cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.' " *Berenyi v. District Director*, 385 U.S. 630, 635 (1967), citing *Graver Tank & Mfg. Co., Inc. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949). No showing of error, obvious or otherwise, has been made here, and these findings compelled the District Court to enter judgment against petitioners.

III. The Courts Below Correctly Applied the *Noerr-Pennington* Doctrine.

Perhaps petitioners' greatest distortion of the decision below is their claim that the District Court extended *Noerr-Pennington* protection [5] to the development of the

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[5] The *Noerr-Pennington* doctrine takes its name from two cases (*Eastern Railroad Presidents Conf. v. Noerr Motor Freight, Inc.*,

CCE standards themselves "merely because state boards or legislatures subsequently refer[red] to the conspirators' private standard-setting organization in rules or statutes." (Pet., p. iii.) This is utterly false, because the District Court never held that *Noerr-Pennington* protection extended to private standard-setting activities. Instead, the District Court applied the *Noerr-Pennington* doctrine only to respondents' petitioning of governmental officials, to respondents' "political lobbying when they persuaded state legislators and administrative boards to bar graduates of anti-diagnostic colleges from licensure." (*Id.* at 29a.) In the District Court's first mention of the *Noerr-Pennington* doctrine and every later reference, the Court made it clear that the only protected activities were respondents' petitioning of state officials:

> [Petitioners'] claims also fail for another reason. As previously noted, those states which have excluded graduates of anti-diagnostic institutions from becoming licensed chiropractors have done so either by legislative or administrative act. [Respondents'] activities in persuading these official state bodies to so act are immunized from liability under the *Noerr-Pennington* doctrine . . . .

Id. at 26a. Nowhere in its opinion did the District Court ever suggest that it was extending *Noerr-Pennington* protection to petitioning aimed at CCE's standards-development process, either because CCE's standards were relied on by governmental agencies or for any other reason.

Petitioners' lengthy argument is thus addressed to an issue that is simply not present in this case.[6]

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365 U.S. 127 (1961), and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965)) that first established the exemption from antitrust liability for collective petitioning of governmental officials.

[6] Petitioners criticize the District Court for considering whether the "sham" or "public co-conspirator" exceptions to *Noerr-Pennington* protection applied to the case (Pet., p. 37), but fail to

The District Court correctly held that *Noerr-Pennington* protection for respondents' petitioning of governmental officials disposed of the petitioners' claims, because only these activities had any impact on, or caused any injury to, petitioners. (Pet., p. 31a.) There was therefore no need to consider whether *Noerr-Pennington* protection extended to other activities that had had no impact on petitioners.

CONCLUSION

This case turns on its unique facts, and is controlled by the application of settled legal principles to the correct and unchallenged findings of fact made by the District Court after a lengthy trial, and unanimously affirmed by the Court of Appeals.

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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mention that those were the principal arguments petitioners raised in the courts below in their effort to have the court deny *Noerr-Pennington* protection to respondents' petitioning activities.

Supreme Court, U.S.
FILED
SEP 4 1987
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CLERK

No. 87-209

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

SHERMAN COLLEGE OF STRAIGHT CHIROPRACTIC, AND STRAIGHT CHIROPRACTIC ACADEMIC STANDARDS ASSOCIATION, INC.,
Petitioners,

v.

AMERICAN CHIROPRACTIC ASSOCIATION, INC., THE COUNCIL ON CHIROPRACTIC EDUCATION, INC., NATIONAL BOARD OF CHIROPRACTIC EXAMINERS, AND SID E. WILLIAMS,
Respondents.

BRIEF OF RESPONDENT AMERICAN CHIROPRACTIC ASSOCIATION, INC., IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the District Court, in evaluating respondents' support of the educational standards of respondent Council on Chiropractic Education ("CCE"), which required chiropractic colleges to provide their students with adequate training in didactic and clinical diagnosis, correctly concluded that petitioners had failed to establish that respondents had unreasonably and illegally restrained trade in the markets for chiropractic education and for chiropractic services.

2. Whether, where the only competitive injury suffered by petitioners occurred as a result of action by those state legislatures and state chiropractic licensing boards which required candidates for admission to practice to graduate from CCE-accredited colleges, and respondents had successfully petitioned these state agencies to accept the prodiagnostic philosophy incorporated in CCE's Educational Standards, the District Court correctly concluded that respondents are entitled to the Noerr-Pennington immunity from antitrust prosecution.

3. Whether the District Court properly granted the motion of respondent American Chiropractic Association ("ACA"), under Fed. R.Civ. P.41(b), to be dismissed from the case, upon the basis that petitioners had failed to present evidence from which one could infer anti-competitive intent on ACA's part, and that the more appropriate inference was that ACA had acted independently to further the best interests of the chiropractic profession and its members.

RULE 28.1 LIST

Respondent American Chiropractic Association, Inc., a Delaware non-profit corporation, states, pursuant to Rule 28.1, that it has no parent, subsidiary, or affiliated companies.

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COUNTERSTATEMENT OF THE CASE

At the conclusion of plaintiff-petitioners' case, on March 26, 1985, the District Court granted the motion of defendant-respondent American Chiropractic Association, Inc. ("ACA") to dismiss under Fed.R.Civ. P.41(b), finding that, upon the facts and the law, petitioners had shown no right to relief, see the District Court's January 16, 1986 Order, Pet.App. 62a-65a. Dismissal was based on plaintiffs' failure to "present sufficient evidence to give rise to an inference of anti-competitive intent on ACA's part," and the Court's finding "that a more appropriate inference from the evidence presented is that ACA, acting as a trade association for the chiropractic profession, undertook activities to further the perceived best interests of the profession and its members." The Court also stated that it adopted for the purposes of its Order the Findings of Fact and Conclusions of Law set forth in its Order of January 9, 1986, see Pet. App. 16a-55a, which at the conclusion of the trial dismissed the case as to defendant-respondents CCE and National Board of Chiropractic Examiners.

On appeal to the U. S. Court of Appeals for the Eleventh Circuit, that Court in a summary *per curiam* opinion affirmed the judgment of the District Court on the basis of that Court's January 9 Order, see Pet. App. 1a-2a, 66a-69a, and denied petitioners' Petition for Rehearing, and for Rehearing En Banc, *ibid,* 70a-73a.

Rather than burden the Court with a counter-statement to Petitioners' Statement of Facts, which is largely inconsistent with the District Court's Findings of Fact and irrelevant to the issues, ACA respectfully

refers this Court to the District Court's findings, see Pet. App. 4a-16a, which were not challenged on the appeal to the Eleventh Circuit.

To explain the basis for ACA's dismissal from the case and clarify ACA's relationship to CCE, the accrediting agency for the chiropractic profession, further factual information is relevant: — ACA is a national service association of chiropractors, engaged in general educational and informational activities, but is not involved in undergraduate chiropractic education, chiropractic practice or accreditation. Pursuant to ACA's by-laws, it has a special responsibility to "protect the professional welfare of its members" and "to establish in the public mind an understanding which will assure maximum recognition and acceptance of the profession, its programs and practices."

Petitioners, with respect to the issue of ACA's antitrust liability, focused on ACA's sponsorship of, financial contribution to and alleged "control" of CCE, the accrediting agency for the chiropractic profession, officially recognized by the U. S. Office of Education, which prescribes educational standards for chiropractic colleges. However, they presented no evidence that ACA ever exercised any influence or control over CCE's formulation of educational standards or accreditation policies. Further, in *Sherman College of Straight Chiropractic* v. *Commissioner of Education*, 493 F. Supp. 976 (D.D.C. 1980), another lawsuit brought by petitioner Sherman College, the Court held that CCE was "autonomous" as defined by the governing federal regulations, 34 C.F.R. §603(d), and concluded that CCE "performs no function that would be inconsistent with the formation of an independent

judgment of the quality of an educational program or institution."

The regulations for accrediting agencies contemplate that they will be sponsored and supported by professional organizations such as ACA, and such sponsorship and support is clearly in the interests of the professional organization. In ACA's case, such support for CCE, and the training of students in diagnosis required by its Educational Standards, was especially important. As was pointed out in *Wilk* v. *American Medical Association*, 719 F.2d 213 (7th Cir. 1983), *cert. denied*, 467 U.S. 1210, 104 S.Ct. 2399 (1984), the American Medical Association and its affiliated network of national and local organizations had, since the 1960s, been pursuing a nationwide campaign to bring about "the containment of chiropractic and, ultimately the elimination of chiropractic" from the health care market. Basic to this campaign was the promoting of "the position of the medical profession that chiropractic is an unscientific cult whose practitioners lack the necessary training and background to diagnose and treat human diseases" (*id*). It was the practical need of the chiropractic profession to protect itself from this defamatory and injurious campaign and to establish its professional integrity which led ACA and its members to support CCE and its improvement of educational and training standards, not any anti-competitive intent directed against Sherman College.

The state of the case law also suggests that ACA's support of the diagnostic philosophy was a measure of self-protection for the chiropractic profession. Numerous decisions have held chiropractors liable for malpractice for misdiagnosis or failure to recognize

the symptoms of various diseases. *See, e.g., Abos* v. *Martin,* 88 P.2d 797 (Cal.1939) (liability for failure to detect tuberculosis of the spinal column); *Willett* v. *Rowlkamp,* 16 N.E. 2d 457 (Ohio 1939) (liability for failure to take x-rays); *Salazar* v. *Ehmann,* 505 P.2d 387 (Colo. 1972) (liability for failure to take x-rays); *Channes* v. *Odum,* 339 N.E.2d 238 (Ill. 1979) (failure to recognize herniated disc and to recognize that chiropractic treatment was inappropriate); *Nostrom* v. *Pettibon,* 607 P.2d 864 (Washington 1980) (liability for failure to recognize medical problem and refer patient to medical doctor); *Roberson* v. *Counselman,* 686 P.2d 149 (Kan. 1984) (doctor of chiropractic held liable for failure to recognize that the patient's symptoms indicated the presence of acute heart disease); *Jansen* v. *Mulder,* 205 N.W. 158 (Mich. 1925) (liability for failure to recognize diphtheria); *Dowell* v. *Mossburg,* 355 P.2d 624 (Ore. 1960), *rev'd on other grounds,* 359 P.2d 541 (Ore. 1961) (failure to recognize diabetes). *See also* Chiropractor's Liability for Failure to Refer Patient to Medical Practitioner, 58 A.L.R. 3d 590 (1974).

From a physiological standpoint, "back pain," the common ailment that brings a patient into a chiropractor's office, may have as many as fifty-eight different causes, both related and unrelated to the spine, including coronary thrombosis, lung disorder, duodenal ulcer, cancer of the stomach, most pelvic conditions (especially diseases of the ovaries and uterus), and liver, kidney, bladder, prostate, intestinal and other diseases, *see* Plaintiffs' Exhibit 258 at pp. 3-4. Adequate training in clinical and differential diagnosis is essential to determine which of these causes is responsible for the "back pain," so that the patient

either may receive appropriate chiropractic treatment or be referred to a qualified health care practitioner, thereby protecting chiropractic's professional reputation and economic interests.

The Task Force established by ACA in June of 1978 was another indication of the general concern that members of the chiropractic profession felt that the existence of chiropractors with the limited view of their profession held by the anti-diagnostics would give the American Medical Association ammunition to attack chiropractic's good reputation and keep it from evolving as a responsible, separate and distinct profession. The Task Force scarcely got off the ground. Although members made speeches and delivered papers during a two or three-hour session in Washington, the Task Force never even delivered a report to the ACA House of Delegates.

SUMMARY OF ARGUMENT

The petition for certiorari should be denied because of (1) the unimportance of the issues presented, (2) the absence of conflict of the decision below with those of this Court or other Circuit Courts, and (3) the unnecessary burden on this Court if it had to review statements and contentions in petitioners' brief that are inconsistent with the unchallenged findings of the District Court. On the facts of this case, the District Court correctly decided that (4) respondents had not unreasonably restrained the markets in chiropractic education and chiropractic practice, (5) respondents qualified for the immunity from antitrust suit conferred under the Noerr-Pennington doctrine for lobbying activities, and (6) the District Court properly granted, at the conclusion of plaintiffs' case,

ACA's Fed. R. Civ.P.41(b) motion to be dismissed from the action.

REASONS FOR DENYING THE WRIT

1. The unimportance of the issues presented by the petition

The Eleventh Circuit, after careful consideration of the record covering ten days of trial and hundreds of exhibits, extensive briefs and oral argument, summarily dismissed petitioners' appeal and denied them a rehearing and a rehearing en banc (see p. 1, above). This is persuasive indication that the petition raises no issue important enough to warrant this Court's supervision. In terms of this Court's Rule 17.1(c), petitioners have not shown that the Eleventh Circuit has sanctioned such a departure by the District Court from the usual and accepted course of judicial proceedings as to call for this Court's supervision.

2. The District Court's decision is not in conflict with decisions of this Court or other Circuit Courts of Appeal

A judicial decision that activities do or do not constitute an unreasonable restraint of trade is necessarily based on the facts of the individual case before the Court. The facts of this case differ so completely from the facts involved in the "group boycott" and other cases cited by petitioners that it cannot be said that the decision of the Court below conflicts with the decisions of this Court or other Circuit Courts of Appeal.

Thus, the "group boycott" decisions occur in a commercial context and involve coercive tactics by suppliers of goods and services that inflict direct economic

injury on their competitors or customers. On the other hand, this case occurs in a health care context involving CCE, the accrediting agency for the chiropractic profession, which prescribes educational standards for chiropractic colleges, including training in didactic and clinical diagnosis. While CCE and its educational standards have the support of the overwhelming majority of chiropractic colleges and practitioners, nothing coercive occurs until a State legislature or chiropractic licensing board endorses those standards, by requiring candidates for admission to practice to be graduates of a CCE-accredited college. ACA, which does not deal with Sherman College and is not engaged in chiropractic undergraduate education, practice or accreditation, can hardly be charged with participating in a boycott of petitioner Sherman College.

Even the cases cited in the health care field by petitioner relate to commercial practices. Thus, *Federal Trade Commission* v. *Indiana Federation of Dentists,* 106 S. Ct. 2009 (1986), which was decided after the District Court's opinion, was claimed by petitioners to have been erroneously ignored by the Eleventh Circuit (Pet. pp. 34-35). It dealt with a conspiracy of a commercial nature among Indiana dentists, their patients and the patients' insurers, involving the dentists' collective refusal to submit x-rays to dental insurers for use in the determination of benefits, which made it more costly for insurers and patients to obtain information needed to evaluate dentists' diagnoses. Similarly, *Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia,* 624 F.2d 476 (4th Cir. 1980), *cert. denied,* 450 U.S. 916, 101 S. Ct. 1360 (1981), held anti-competitive collective

requirements that psychologists submit their bills through psychiatrists. Without reviewing the other cases cited by petitioners, it may safely be said that they also deal with radically different factual contexts and do not involve the quality health care and public interest presumptions found applicable in this case (see Pet. App. 25a-26a). They are therefore not in conflict with the District Court's decision.

3. The grant of certiorari would involve this Court in the unnecessary and burdensome review of statements and contentions that are inconsistent with the District Court's unchallenged findings.

The District Court's unchallenged fact findings (Pet.App. 4a-16a) show in considerable detail that the present controversy arose from the conflict between the pro-diagnostic and anti-diagnostic philosophies held within the chiropractic profession. This conflict culminated in the official requirement, adopted by all but eleven competent State legislative and administrative bodies, after public hearings, that candidates for licensure be graduates of CCE-accredited colleges and consequently adequately trained in didactic and clinical diagnosis.

Petitioners' Statement of the Case consists largely of contentions and statements that have no support in the lower Court's findings. One of their main contentions is that the CCE standards and the people supporting them have medical objectives that go beyond the permissible practice of chiropractic and permit chiropractors to practice medicine in violation of state law (Pet. pp.4-10, 18-20). This is neither true nor, in a case involving educational standards, relevant, since ACA, CCE and chiropractic colleges recognize that chiropractors must practice their

profession in accordance with the laws of the State in which they operate. Also, the petitioners erroneously contend that false testimony was given, before the U. S. Department of Education, that CCE did not impose medical objectives on the colleges (Pet. pp. 15-17).

Other fallacious contentions of the petitioners not found by the Court as facts are (a) that the CCE standards "were financially, not educationally, motivated and [were] not based on studies or data" (Pet. p. 14); (b) that the public will be bilked when patients are referred after diagnosis to medical doctors (Pet. p. 22); (c) that ACA had agreements with CCE not to accredit Sherman College unless it advocated the medical concept of chiropractic (Pet. p.30); and (d) that ACA had an anti-competitive purpose and an anti-competitive effect (Pet. p.30) — the former contradicted by the District Court's decision of January 16, 1986 and the latter by its decision of January 9, 1986 (Pet.App.25a-26a).

This Court should not grant certiorari where it will have to review these and other fallacious factual statements and contentions that are inconsistent with the District Court's findings.

4. The District Court correctly held that petitioners had failed to establish an unreasonable restraint of trade in the markets for chiropractic education and chiropractic services.

Despite the failure of petitioners to identify the relevant markets in this case, the District Court decided that they were the markets for chiropractic education and chiropractic services (Pet. App. 16a-17a). It concluded that the "rule of reason" rather than the *per se* rule was the appropriate test to apply, and

we assume that petitioners are no longer advocating the untenable position that the *per se* rule applies. The District Court, after stating the opposing contentions of the parties, correctly concluded that petitioners had failed to meet their burden of producing evidence that respondents unreasonably restrained the market for either chiropractic education or services, basing its conclusions on the absence of proof of anti-competitive effects (Pet.App.17a-26a). Petitioners have shown no substantial basis for asking this Court to review these conclusions, based as they were on their failure to produce evidence in a case where quality health care and the public interest were found to have been served by the promotion of enhanced education and training requirements.

5. The District Court correctly decided that respondents are entitled to the Noerr-Pennington immunity from antitrust prosecution.

The only competitive injury suffered by petitioner Sherman College occurred as a result of state action — the requirement of 39 state legislatures and chiropractic licensing boards that candidates for admission to practice be graduates of CCE-accredited colleges. Respondents have appeared before these state agencies to support this requirement, because of their legitimate interest in having properly qualified chiropractic practitioners, adequately educated and trained in didactic and clinical diagnosis and other procedures in accordance with CCE's educational standards. But such lobbying does not by itself exclude the graduates of non-CCE-accredited colleges from admission to practice, or inflict competitive injury on Sherman College.

The Court below correctly held that respondents' lobbying of state agencies immunized them from antitrust liability under the Noerr-Pennington doctrine, a doctrine based on the First Amendment protection of the constitutional rights of petition and free speech and the need for open communication between the public and its lawmakers, "which is vital to the functioning of a representative democracy," see *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-38 (1961); *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965); *Lafayette* v. *Louisiana Power and Light Co.*, 435 U.S. 389, 399 (1978). ACA sees no need to duplicate the elaborate analysis of the Noerr-Pennington doctrine and its judicial progeny contained in the District Court decision (Pet.App. 26a-55a), demonstrating that the "sham exception" and the "public co-conspirator exception" are inapplicable in this case.

Petitioners' contention that the Noerr-Pennington doctrine does not apply to the lobbying of a standard-setting organization such as CCE (see Pet. App. 38-43) was first raised about ten days before the Eleventh Circuit summarily affirmed the District Court's Order, when petitioners submitted the Justice Department and Federal Trade Commission *amicus* briefs in the *Indian Head* and *Sessions Tank Liners* cases, and the Circuit Court promptly returned them to counsel as inappropriate authority in the appeal. Their argument has no application to this case, since respondents never lobbied CCE (see pp. 2-3, above) and therefore never claimed Noerr-Pennington immunity for that activity.

6. The validity of ACA's early dismissal from the action at the end of plaintiffs' case pursuant to ACA's Fed. R.Civ. P. 41(b) motion.

At the conclusion of plaintiff-petitioners' case, the District Court granted ACA's Fed. R. Civ.P.41(b) motion to be dismissed from the case, on the basis that petitioners had failed to present evidence from which one could infer anti-competitive intent against petitioners on ACA's part, and that the more appropriate inference from their evidence was that ACA had acted independently to further the best interests of the chiropractic profession and its members (see Pet. App. 63a).

As indicated at pp. 2-5 above, ACA supported CCE and its educational standards to further the best interests of the chiropractic profession and its members, whose welfare ACA had a responsibility to protect and whose acceptance by the public it was responsible for promoting. ACA supported the diagnostic philosophy to protect the profession from malpractice suits for misdiagnosis or failure to recognize the symptoms of diseases, and from the nationally organized campaign of medical organizations to eliminate chiropractic from the health care market, on the ground that chiropractors lacked the necessary training and background to diagnose and treat human diseases. Also, there is no evidence that ACA ever exercised any influence or control over CCE's educational standards or accreditation policies, or had any anti-competitive intent.

In this case, the mere fact that both ACA and CCE supported the diagnostic philosophy is not sufficient to establish an illegal antitrust conspiracy, or that ACA had a motivation to enter into such a conspiracy,

see the discussion in *Kreuzer* v. *American Academy of Periodontology*, 735 F.2d 1479, at 1487-88 (D.C.Cir. 1984); *Venzie Corp.* v. *United States Mineral Products Co.*, 521 F.2d 1309, at 1314-15 (3d Cir. 1975). Bearing in mind the Court's conclusion that petitioners failed to prove that ACA's activities diminished competition in a relevant chiropractic market (see Pet.App.64a), the District Court's dismissal of ACA was fully justified.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

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In The
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October Term, 1987

SHERMAN COLLEGE OF STRAIGHT CHIROPRACTIC, *et al.*,

Petitioners,

v.

AMERICAN CHIROPRACTIC ASSOCIATION, INC., *et al.*,

Respondents.

NATIONAL BOARD OF CHIROPRACTIC EXAMINERS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Is there any basis for granting review where both the district court and the court of appeals (1) concluded as a matter of law that the rule of reason applied to self-evidently non-horizontal alleged conduct of respondents, and (2) found as a matter of fact that none of the conduct alleged to have been engaged in by respondents had had any anti-competitive effect in any relevant market?

DESIGNATION OF PARTIES

The petitioners and respondents are identified in the caption appearing on the cover of the petition. The National Board of Chiropractic Examiners has no corporate parents, subsidiaries or affiliates.

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No. 87-209

In The
Supreme Court of the United States
October Term, 1987

SHERMAN COLLEGE OF STRAIGHT CHIROPRACTIC, *et al.*,

Petitioners,

v.

AMERICAN CHIROPRACTIC ASSOCIATION, INC., *et al.*,

Respondents.

NATIONAL BOARD OF CHIROPRACTIC EXAMINERS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

OPINIONS BELOW

The opinion of the court of appeals is reported at 813 F.2d 349, and the opinion of the district court is reported at 654 F. Supp. 716. Both opinions are reproduced in the appendix to the petition.

STATEMENT OF THE CASE

It is respectfully submitted that it is impossible to obtain any clear idea, from petitioners' statement of the case, where respondent National Board of Chiropractic Examiners ("NBCE") fits into this case. To rectify that, while avoiding repetition with other responses to the petition, the NBCE will set forth herein in capsule form the facts as established at trial which relate to the NBCE's participation in the fact situation which gave rise to the lawsuit.

The NBCE is a non-profit corporation established in the early 1960's. Its principal business is to prepare and administer a national examination for the purpose of testing the academic knowledge of students and graduates of chiropractic colleges. The national examination is given twice a year at testing sites throughout the United States, including petitioner Sherman College of Straight Chiropractic ("Sherman"), and in foreign countries. No other organization performs a similar service for the chiropractic profession.

Almost all states recognize the NBCE's examination and use the results as part of their licensing process, but it is a prerequisite for licensure in only four or five states; in all other states there is an alternative for testing academic knowledge as part of the licensing process.

Although the NBCE's principal source of revenue is the fees paid by those who take its examination, its real "customers" are the state boards, as it is they who must be kept satisfied. The continuing economic viability of the NBCE depends upon the state boards continuing to

recognize its national examination and use it as part of their licensing process; if they did not continue to do so, there would be no reason for chiropractic students and graduates to pay to take the NBCE's examination.

In 1974, when respondent Council on Chiropractic Education ("CCE") received official recognition as a chiropractic accrediting agency from the United States Office of Education, the only requirement for a chiropractic student or graduate to take the NBCE examination was a certification from his or her college. However, the recognition of the CCE by the United States Government was a highly significant event to the profession, and led to pressure on the NBCE from its customers—the state boards—to examine only students and graduates of CCE-accredited colleges. Dr. Webster (the President of the NBCE at the time of trial) explained:

> "I think it was generally the consensus of the examining boards with the raise [*sic*] in credentials if you will of the professional educational standards that the testing agency should also start elevating its testing standards and its eligibility requirements."

After increased pressure from the state licensing boards, in May 1978 the NBCE adopted the policy statement which gave rise to what appears to be the principal claim against it in this lawsuit. The policy statement provided that, starting with the March 1980 examination, the NBCE would examine

> "those applicants graduating from colleges which have officially adopted the standards of education set forth by a chiropractic accrediting agency recognized by USOE, and which have an active application before the accrediting agency."

Because Sherman had decided not to adopt the standards of education of the only chiropractic accrediting agency recognized by the USOE—the CCE—and did not have an application before that agency, the NBCE's policy statement, had it ever become effective, would have precluded Sherman students and graduates from taking the NBCE examination. No such result ever occurred, however. During the nearly two-year period between the adoption of the policy statement and its prospective effective date, the NBCE reconsidered its position and rescinded the policy statement, as a result of advice it had sought from the Federal Trade Commission, the United States Office of Education, and others.

Sherman's students and graduates have taken the NBCE examination every time it has been offered since Sherman had been in existence long enough for its first group of students to have completed sufficient course work to be prepared for the examination.

———o———

REASONS FOR DENYING THE WRIT

I

THE DECISION OF THE COURT OF APPEALS AFFIRMING THE DISTRICT COURT'S APPLICATION OF THE RULE OF REASON TO THE CLAIMS AGAINST THE NBCE, AND AFFIRMING THE DISTRICT COURT'S FINDING OF LACK OF ANTI-COMPETITIVE EFFECT, CORRECTLY FOLLOWS THE TEACHINGS OF THIS COURT.

A. The Petition Misstates and Distorts the Holdings of the Courts Below.

It is important, in analyzing the petition, to realize that in many places it completely mischaracterizes the holdings of the courts below.

The petition seeks to persuade this Court that the courts below found a combination, a conspiracy, or a horizontal boycott, and then failed to apply the correct antitrust analysis to that conduct. Thus, the petition states at various places:

> "The lower court held in this Sherman Act conspiracy case that defendants' explicit combination to eliminate the petitioners . . . was not 'unreasonable' . . . ." (Pet., i)
>
> "Whether a horizontal agreement among dominant competitors to exclude other competitors . . . creating a concerted refusal to deal, is 'reasonable' . . . ." (Pet., ii)
>
> "Whether a private conspiracy among professionals to eliminate competition . . . is presumptively unreasonable . . . ." (*Ibid.*)
>
> "[I]n its final written order the court held that the defendants' conspiracy to boycott Sherman College from competing with the CCE accredited colleges had no anticompetitive effect." (Pet., 20)

"[T]he trial court held that the boycott had no anticompetitive effect . . . ." (Pet., 21)

"[T]he court held that the admitted combination was 'reasonable' . . . ." (Pet., 31)

"The lower court held that this intentional agreement . . . was not unreasonable . . . ." (Pet., 34)

The lower courts did not find a combination, a horizontal agreement, a private conspiracy, a conspiracy to boycott, a boycott, an admitted combination, or an intentional agreement. Those are figments of petitioners' imagination. The lower courts correctly avoided trying to pigeonhole the facts, and did not use, directly or indirectly, any such characterizations as petitioners now claim were utilized.

The point need not be belabored; the lower courts' opinions are perfectly plain on this point, and the petition is seriously misleading.

B. The Courts Below Correctly Held that the Rule of Reason Is Applicable to the Claims Against the NBCE.

In refusing to view the case against the NBCE as a horizontal one, the lower courts were surely right. When consideration is given to how the NBCE fits into the chiropractic profession, it is clearly seen that it does not have a horizontal relationship with *any* of the petitioners or respondents:

—The NBCE is not involved in any aspect of the process of the accreditation of chiropractic colleges, and therefore does not compete with, or act in the same market as, respondent CCE or petitioner SCASA;

—The NBCE is not involved in any aspect of teaching chiropractic, and therefore does not compete in any way with, or act in the same market as, any of the colleges in the CCE, or with Dr. Williams or his college, or with Sherman;

—The NBCE is not in any sense a trade association of chiropractors, and therefore does not compete in any way with, or act in the same market as, respondent ACA;

—The NBCE does not practice chiropractic, and therefore does not compete with, or act in the same market as, any of the individual members of respondent ACA, or with graduates of any of the CCE colleges, or of Dr. Williams' college, or of Sherman;

—The NBCE does not license persons to practice chiropractic, and therefore does not compete with, or act in the same market as, any of the state licensing boards which are members of the alleged co-conspirator Federation of Chiropractic Licensing Boards.

The NBCE thus is not in a horizontal relationship with any of its alleged co-conspirators, or with either of its alleged victims.

The petition does not cite a single case suggesting that the *per se* rule, rather than the rule of reason, would be appropriate in analyzing claims such as those against the NBCE. Indeed, petitioners have cited no cases involving activities such as those of the NBCE at issue here. That makes the lower courts' application of the rule of reason all the more obviously correct, for, as this Court has held, the concept of *per se* illegality is appropriate only in respect of trade practices with which the courts have had considerable experience. *Broadcast Music, Inc. v. Columbia Broadcasting Co.*, 441 U.S. 1 (1979).

In attempting to show that the lower courts were wrong in their analysis of this case, the petition relies most heavily on this Court's decision in *FTC v. Indiana Federation of Dentists*, — U.S. —, 106 S. Ct. 2009 (1986). The NBCE agrees that *Indiana Federation* is a case of great significance to the petition; what it shows is that the lower courts correctly followed the teachings of this Court.

Indiana Federation was a far stronger case for the application of the *per se* rule than is petitioners' case against the NBCE. Entirely unlike the present case, *Indiana Federation* involved horizontal competitors who had engaged in a horizontal agreement which this Court said "resembled practices that have been labeled 'group boycotts.'" (106 S. Ct. at 2017)

This Court held that the *per se* rule should not be applied to the conduct at issue in *Indiana Federation*:

> "Although this Court has in the past stated that group boycotts are unlawful *per se*, see *United States v. General Motors Corp.*, 384 U.S. 127 (1966); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959), we decline to resolve this case by forcing the Federation's policy into the 'boycott' pigeonhole and invoking the *per se* rule. As we observed last term in *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, 472 U.S. —, 105 S. Ct. 2613, 86 L. Ed.2d 202 (1985), the category of restraints classed as group boycotts is not to be expanded indiscriminately, and the *per se* approach has generally been limited to cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor—a situation obviously not present here. Moreover, we have been slow to condemn rules adopted by profes-

> sional associations as unreasonable *per se*, see *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978), and, in general, to extend *per se* analysis to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious, see *Broadcast Music Inc. v. CBS*, 441 U.S. 1 (1979)." 106 S. Ct. at 2017-18.

When petitioners' claims against the NBCE are viewed in the light of *Indiana Federation*, it is clear that the case does not at all involve the type of activity which this Court would find appropriate for *per se* treatment, and it is clear that the courts below were correct in applying the rule of reason to those claims.

The other case upon which petitioners seem to place heavy reliance—*Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959)—is not at all relevant. *Klor's* involved an alleged classic horizontal conspiracy among manufacturers and distributors to refuse to deal with a retailer; it has nothing to do with the non-horizontal conduct involved here.[1]

C. The Courts Below Correctly Found that the NBCE's Activities Had No Anti-Competitive Impact in Any Relevant Market.

Petitioners never identified for the district court any relevant market, so that court had to find its own markets

---

[1]The petition's discussion of the district court's treatment of *Klor's* (p. i) is highly misleading. The district court did not "squarely hold" that *Klor's* is "no longer good law"; the petition misquotes a remark from the bench during the trial in which the court said that *Klor's* "is not a good case." Neither the court of appeals nor the district court cited *Klor's* in their opinions—with good reason, since the facts of *Klor's* are so far from the facts of the instant case.

—the chiropractic education market and the chiropractic health care services market. The court found that petitioners "have presented no evidence of diminished competition in the chiropractic education market" (Appendix to Petition, p. 18a) and that, as to the chiropractic health care services market, "the evidence does not preponderate in favor of a finding of unreasonable anti-competitive effect." (*Id.* at 25a) The court of appeals' affirmance of those findings was clearly correct as to the NBCE.

Petitioners' principal claim against the NBCE relates to the policy statement, referred to at pp. 3-4 above, which, had it gone into effect, would have precluded Sherman students and graduates from taking the NBCE's examination (because Sherman had decided not to adopt the standards of the only chiropractic accrediting agency recognized by the United States Office of Education). As noted above, however, that policy statement was rescinded before it ever took effect. The net result is that Sherman students and graduates have taken the examination every time it has been offered since Sherman had students far enough along to take it.

The lack of anti-competitive impact is obvious. There was no showing that the stillborn policy statement was unreasonable or anti-competitive.

As part of its effort to avoid the devastating effect of the petitioners' failure to show any anti-competitive impact of the NBCE's (and the other respondents') alleged conduct, the petition states (p. 14):

> "As a result of the foregoing exclusionary conduct, petitioner Sherman cannot attract chiropractic students in sufficient number to remain in business."

The concept that Sherman could not remain in business was never presented to either of the lower courts. No evidence to support it was offered at trial, and it never formed a part of petitioners' trial presentation. Its bald assertion at this point, without any support in the record, is an imposition on this Court and an indication of the weakness of the petition.

In any event, the district court's findings of lack of anti-competitive impact were carefully made by a judge who had sat through ten days of trial which included the presentation of extensive live testimony, the introduction of voluminous documentary evidence and the introduction of the testimony of six witnesses by deposition. Surely it is not the function of this Court, nor the purpose to be served by the issuance of a writ of certiorari, to re-evaluate the evidence presented at trial to see if this Court agrees or disagrees with the conclusions of the district court as affirmed by the court of appeals.

———o———

CONCLUSION

This case presents no issue under the Sherman Act worthy of review. The decisions by the district court and the court of appeals that the rule of reason is applicable to the conduct alleged are fully in line with controlling precedent in this Court. The decision by the district court, affirmed by the court of appeals, that the alleged

conduct was without anti-competitive impact was correct and is in any event not a decision appropriate for this Court's attention. The writ should be denied.

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NO. 87-209

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM 1987

SHERMAN COLLEGE OF STRAIGHT CHIROPRACTIC, AND STRAIGHT CHIROPRACTIC ACADEMIC STANDARDS ASSOCIATION, INC.,

Petitioners,

v.

AMERICAN CHIROPRACTIC ASSOCIATION INC., THE COUNCIL ON CHIROPRACTIC EDUCATION, INC., NATIONAL BOARD OF CHIROPRACTIC EXAMINERS, AND SID E. WILLIAMS,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

I. THE OPINION BELOW IS IN DIRECT CONFLICT WITH RECENT DECISIONS OF THE SECOND AND THIRD CIRCUITS

None of the defendants cite Indian Head, v. Allied Tube & Conduit Corp. ___F.2d___,1987-1 Trade Cases Paragraph 67,547, (2nd Cir. 1987), cert. filed 7-23-87, or Pa. Dental Ass'n et al. v. Medical Services Ass'n of Pa. et al., 815 F.2d 270 (3rd Cir. 1987). Yet at pages 13 of its brief defendant CCE seems to suggest that the opinion of the trial court, as affirmed by the Eleventh Circuit, is not in conflict with Indian Head or Pa. Dental Ass'n. CCE now contends that the court in the present case did not extend Noerr-Pennington immunity to the CCE standard-setting or to CCE's attendant decision to exclude colleges like Sherman who refused to adhere to those standards.

Yet, CCE gave the distict court's

ruling a contrary interpretation in its brief to the Eleventh Ciruit, at a time when the Second Circuit's decision in Indian Head and the Third Circuit's decision in Pa. Dental Ass'n had not yet been rendered. In its brief to the Eleventh Circuit, CCE highlighted that Noerr-Pennington protected all its activities. A heading in its brief to the Eleventh Circuit, states:

> Defendants' Petitioning and Other Activities, Were Protected by the Noerr-Pennington Doctrine (emphasis added)

(Brief of Defendant - Appellee the Council on Chiropractic Education, Inc. - Eleventh Circuit page 26,). CCE's brief to the Eleventh Circuit at page 26 went on to argue:

> "Plaintiffs also complain of CCE's accreditation decisions,.... As the District Court recognized, all of these activities come squarely within the protection from antitrust liability, provided by the Noerr-Pennington, doctrine." (emphasis added)

As discussed in the Petition for Writ of Certiorari, the lower court incorrectly excused all plaintiffs claims, including the challenge to the CCE's anti-competitive exclusionary standards as being immune under the Noerr-Pennington doctrine. The ruling is an improper extension of the Noerr-Pennington doctrine, and is in direct conflict with the Second Circuit holding in Indian Head, supra, and the holding of the Third Circuit in Pa. Dental Ass'n., supra.

II. WHETHER EXCLUSIONARY STANDARD-SETTING OF COMBINATIONS OF PROFESSIONALS CAN BE AN "UNREASONABLE" RESTRAINT OF TRADE IS AN IMPORTANT, RECURRING, ISSUE THAT SHOULD BE DECIDED BY THIS COURT

At page 9 of its brief, defendant CCE states:

> CCE's accreditation standards and the standards of other standard-setting organizations are necessarily "exclusionary" because all standards exclude those colleges, products, or services that fail to measure up.

Without citing any legal authority, CCE is arguing that the establishment of standards by standard-setting organizations is inherently exclusionary but is per se legal. This is untrue. Proper standard-setting is informative and pro-competitive. Standard-setting designed to restrict competition lacks informational values, restricts consumers choice, and should carry with it a proscription of unreasonableness. This Court has repeatedly announced that

because standard-setting organizations are comprised of competitors and, are a potential breeding ground for anticompetitive activity, such organizations and their standards should be subject to close antitrust scrutiny.

In American Society of Mechanical Engineers v. Hydrolevel Corp., 456 U.S. 556, 102 S.Ct. 1935 (1982) this Court specifically cautioned:

> "...[A] standard-setting organization like ASME can be rife with opportunity for anticompetitive activity.

102 S. Ct. at 1945. The activities and standards of such organizations must be scrutinized with respect to anticompetitive purpose or effect, NCAA v. Board of Regents supra, and the standards must be the least restrictive of competition, Wilk v. American Medical Assn. 719 F2d 207 (7th Cir. 1983), cert. denied 104 S. Ct. 2399. Once plaintiffs prove standards have been created

with an anticompetitive purpose or effect, the burden is on the defendants to justify the "exclusionary" standards in terms of their value to the existance and continuation of the market", rather than by vague notions of "public safety". Federal Trade Commission v. Indiana Federation of Dentists, __U.S.__, 106 S. Ct. 2009 (1986).

III. THE RECENT WILK DECISION UNDERSCORES THE IMPORTANCE OF THIS CASE AND THE CONFLICTING TREATMENT OF PROFESSIONAL BOYCOTT ACTIVITY BY THE LOWER COURTS

The defendants arguments and the written opinion of the trial court which was adopted by the Eleventh Circuit are in direct conflict with the very recent ruling of the district court in Wilk v. American Medical Assn., __F. Supp.__, 1987-2 Trade Cases Paragraph 67,689 (N.D.Ill. Sept 1987). Ironically, the ACA and other defendants in the present case supported the plaintiffs' boycott claims in Wilk. The plaintiff

chiropractors in Wilk accused organizations in the medical profession of virtually identical boycott activity to that of the defendants in the case at bar. Recently, Judge Getzendanner in Wilk et. al., v. American Medical Association, supra, found the AMA and other defendants, through activities nearly identical to the undisputed exclusionary activities of the defendants in the case at bar, engaged in a "systematic, long-term intent to destroy a licensed profession..." Wilk, at pg. 48, Trade Cases at pg. 58,547.

Furthermore, consistent with the recent Supreme Court opinion in Federal Trade Commission v. Indiana Federation of Dentists, __U.S.__, 106 S.Ct. 2009 (1986), the trial court in Wilk properly recognized the anti-competitive purpose and anti-competitive effects of defendants' boycott. Specifically, the court in Wilk

made the following statements which are in direct conflict with the rulings below in this action:

> "Whether or not the elimination of competition per se was consciously intended, that was the natural result of an intent to destroy a competitor. The AMA's market power is also relevant..." "Given the substantial market power of AMA members and the specific intent of the AMA, a substantial adverse effect on competition is evident. Despite the fact that the number of chiropractic schools, the number of chiropractors, and the number of patient visits to chiropractors grew during the boycott, ...the boycott was successful."

Wilk at pgs. 22-23, Trade Cases at pg. 58,539.

IV. THE PETITION FOR WRIT OF CERTIORARI DOES NOT CHALLENGE THE FACT FINDINGS OF THE TRIAL COURT

Contrary to CCE's suggestion, (Brief in opp. pg. 6) the petitioners do not challenge the findings of fact of the trial court. The petition relies upon the findings of facts of the trial court and the uncontradicted documentary evidence. Near the outset of its order, the trial court stated that the facts were not in dispute:

> "The evidence presented at trial--especially the documentary evidence--was voluminous. Nonetheless, most of the facts are undisputed and in any event are not as complex as the length of the record might indicate" (Appendix pg. 4a)

Accordingly, respondents effort (Brief in Opp. pg. 12) to argue the "two-court" rule is misplaced.

V. THE TRIAL COURT FOUND THAT DEFENDANTS HAVE MARKET DOMINANCE

In footnote 3, page 9, of its brief, the CCE tries to dispute a significant finding of fact of the trial court. CCE's suggestion that the court did not find defendants had "dominance" is wrong on the face of the trial court's order. After describing the defendants as pro-diagnostic forces (App. pgs. 4a - 6a), the court expressly stated:

> "Over the past ten to fifteen years, the pro-diagnostic forces have achieved dominance in the profession. (emphasis added) (App. pg. 6a)

Later, the Court explained that the defendants' "dominance" caused the enrollment and financial health of Sherman to decline and caused the CCE colleges to prosper. (App. 13a - 14a)

VI. DEFENDANTS' CONDUCT CONSTITUTED A HORIZONTAL COMBINATION

For the first time in this case, all the defendants argue that their boycott does not restrain trade because they were not "horizontal" competitors of plaintiffs. The argument is without merit. The undisputed facts show that plaintiff SCASA is a chiropractic accrediting agency. Defendant, CCE, is a competing chiropractic accrediting agency. CCE is composed of chiropractic colleges that compete with plaintiff, Sherman College. Defendant, Sid Williams, is a chiropractor and president of a competing chiropractic college. The ACA is an organization of chiropractors that compete with graduates of plaintiff, Sherman College. Defendant, NBCE, is composed of competing chiropractors and educators from competing colleges.

Defendants' newly asserted defense does not withstand even a quick readying of

the numerous section one cases involving standard-setting and professional organizations, which clearly recognize professional organizations as combinations of competing members. See, American Society of Mechanical Engineers v. Hydrolevel Corp., 456 U.S. 556, 102 S.Ct. 1935 (1982); Federal Trade Commission v. Indiana Federation of Dentists, ___U.S.___, 106 S.Ct. 2009 (1986); National Society of Professional Engineers v. United States, 435 U.S. 679 (1978); NCAA v. Board of Regents 468 U.S. 85, 104 S. Ct. 2948 (1984); U.S. v. Realty Multi-List, Inc., 629 F.2d 1351 (5th Cir. 1980).

VII. STATE TORT DECISIONS DO NOT JUSTIFY FEDERAL ANTITRUST VIOLATIONS

In its brief, the ACA argues that it had good reasons to restrain Sherman's ability to compete. Page four of its brief cites numerous malpractice cases against

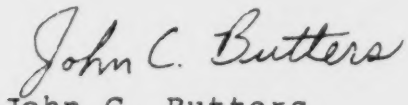
chiropractors. Apparently, ACA is arguing that its boycott is justified because chiropractors in the past have been sued for not doing what state law forbids them to do --to diagnose and treat disease, which is the practice of medicine. The malpractice argument is irrelevant under antitrust law. National Society of Professional Engineers v. United States, 435 U.S. 679 (1978); Wilk v. American Medical Assn., 719 F.2d 207 (7th Cir. 1983), cert. denied 104 S.Ct. 2399.

Finally, the facts of the malpractice cases do not challenge traditional chiropractic taught at Sherman, and defendants have not cited a single malpractice case against a Sherman graduate. Neither at trial nor presently[1] do defendants validly dispute that their organizations forced chiropractic colleges to teach chiropractors to practice of medicine.

CONCLUSION

The uncontroverted facts, as shown in the trial court's order, demonstrate the difficulty lower courts have had in dealing with antitrust challenges to professional standard-setting activity. The lower courts are in conflict and the issue is exceedingly important. The Petition for Writ of Certiorari should be granted.

Respectfully submitted,



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FOOTNOTE 1.

In an article, "The Final Push" in the July/August 1987 issue of "Today's Chiropractic", defendant Sid Williams openly admits that: "Now, as the chiropractic educational institutions come increasingly under ACA influenced reform, emphasis is shifting away from philosophy in science of chiropractic toward an allopatic whole body treatment orientation"..."[I]t will be a relatively short time before the chiropractic associations will be meeting the same standards as medical doctors, to include college and ultimate, unnecessary internship." (emphasis added)